

PRINCIPLES OF CONTRACT:

A TREATISE ON THE
GENERAL PRINCIPLES CONCERNING THE VALIDITY
OF AGREEMENTS IN THE LAW OF ENGLAND.

SEVENTH EDITION

BY

SIR FREDERICK POLLOCK, BART.,

OF LINCOLN'S INN, BARRISTER-AT-LAW;

CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD; LATE FELLOW OF
TRINITY COLLEGE, CAMBRIDGE; D.C.L. OXFORD; HON. LL.D. EDINBURGH, DUBLIN AND HARVARD;
AND CORRESPONDING MEMBER OF THE INSTITUTE OF FRANCE.

"This notion of Contract is part of men's common stock even outside the field of legal science, and to men of law so familiar and necessary in its various applications that we might expect a settled and just apprehension of it to prevail everywhere. Nevertheless we are yet far short of this."—SAVIGNY, *System des heutigen römischen Rechts*, § 140.

S. N. D.
Advocate High Court
Jammu & Kashmir
Srinagar.

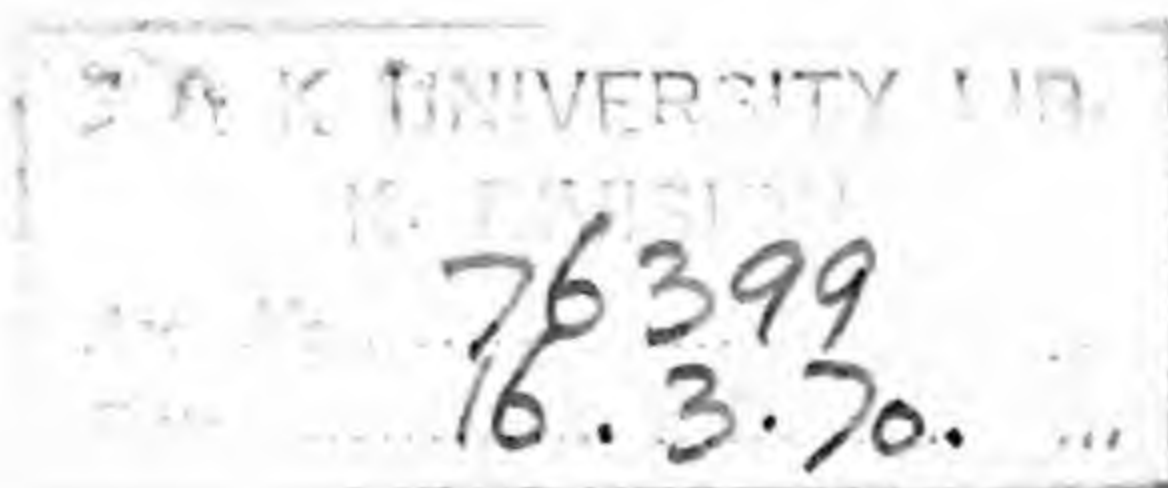
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DEDICATED TO
MY MASTER IN THE LAW,
THE RIGHT HONOURABLE
NATHANIEL LORD LINDLEY.

S. N. Dar
Advocate High Court
Jammu & Kashmir
Srinagar.

PREFACE

TO THE SEVENTH EDITION.

TWENTY-FIVE years have passed since the first edition of this book was published. At that time the concurrent administration of equity and common law under the Judicature Acts was quite new; modern company law was in its infancy, and so was the revived study of Roman law in this country; colonial, Indian, American, and foreign laws and legislation were little known and sometimes, especially as regards our own colonies, really difficult of access in England.

A young writer might well be excused at that time for setting forth with some pains, if not always in the most appropriate places, things of which he had not been able to find an orderly account (at any rate in his own language) anywhere else. Now there has been great change in all these matters. English students may read books in English on Roman law which they can safely trust, and we have an English Society of Comparative Legislation which publishes an excellent journal. I have endeavoured to bear this in mind in preparing the present edition, and have omitted or abridged much discussion which seemed to be no longer useful.

The space thus set free has been claimed partly by new authorities, partly by the results

of historical research, and partly by the consideration due to the recent arguments on principle of learned writers, both here and in America. But I have also borne in mind that exploded errors may remain a necessary part of the history of the law, and cannot be ignored even by purely practical text-writers so long as any ingenious advocate may by possibility attempt to revive them.

The most considerable alterations will be found in the earlier chapters. Besides other additions and amendments in detail, what is said of the doctrine of corporations in general has been recast and condensed, and the historical account of Consideration has been wholly rewritten. An excursus on the Roman and medieval law of contracts has been transferred, with some revision, from the text of Chapter III. to the Appendix. In Chapter VII. the rules as to contracts in restraint of trade have been reduced to a much simpler form in consequence of the leading decision of the House of Lords in *Nordenfelt's case*.

The index to this edition has been prepared by my clerk, Mr. Edward Potton, who is qualified by many years' experience of proof-reading and indexing under my general direction. It is now fuller than in any previous edition, and, it is hoped, will be found more useful.

F. P.

LINCOLN'S INN,
Hilary Term, 1902.

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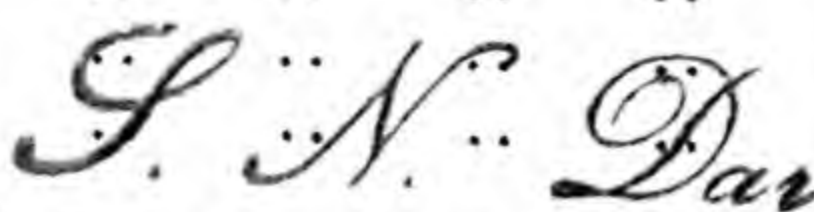
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PRINCIPLES OF CONTRACT.

CHAPTER I.

AGREEMENT, PROPOSAL, AND ACCEPTANCE.

THE law of Contract may be described as the endeavour of the State, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness. Accordingly the most popular description of a contract that can be given is also the most exact one, namely that it is a promise or set of promises which the law will enforce. The specific mark of contract is the creation of a right, not to a thing, but to another man's conduct in the future. He who has given the promise is bound to him who accepts it, not merely because he had or expressed a certain intention, but because he so expressed himself as to entitle the other party to rely on his acting in a certain way. This is apt to be obscured in common cases, but is easily seen to be true. Suppose that A. agrees to sell to B. a thing of which not he but C. is the true owner. C. gives the thing to B. Here, though B. has got the thing he wanted, and on better terms than he expected, A. has not kept his promise; and, if the other requisites of a lawful contract were present as between himself and B., he has broken his contract. The primary questions, then, of the law of contract are first, what is a promise? and next, what promises are enforceable?

The importance and difficulty of the first of these questions depend on the fact that men can justly rely on one another's intentions, and courts of justice hold them bound to their fulfilment, only when they have been expressed in a manner that would convey to an indifferent person, reasonable and reasonably competent in the matter in hand, the sense in which the expression is relied on by the party claiming satisfaction. Judges and juries stand in the place of this supposed indifferent person, and have to be convinced that the dealings in the particular case contained or amounted to the promise alleged to have been made and relied upon.

Our first business must therefore be to separate and analyse the elements which, generally speaking, must concur in the formation of a contract. A series of statements in the form of definitions, though necessarily imperfect, may help to clear the way.

Contract. 1. Every agreement and promise enforceable by law is a contract.

Agreement. 2. An agreement is an act in the law whereby two or more persons declare their consent as to any act or thing to be done or forborne by some or one of those persons for the use of the others or other of them (*a*).

Expression of consent. 3. Such declaration may take place by
 (a) the concurrence of the parties in a spoken or written form of words as expressing their common intention, or
 (b) an offer made by some or one of them, and accepted by the others or other of them.

Promise and offer. 4. The declaration of any party to an agreement, so far as relates to anything to be done or forborne on his part,

(*a*) This statement has been adopted by Kekewich J. *Foster v. Wheeler* (1887) 36 Ch. D. 695, 698, 57 L. J. Ch. 149.

is called a promise. The expression of a person's willingness to become, according to the terms expressed, a party to an agreement, is called an offer or proposal.

An offer may become a promise by acceptance, but is not a promise unless and until it is accepted (b).

5. An agreement which has no legal effect is said to be void. An agreement which ceases to have legal effect is said to become void or to be discharged. Void agreement.

6. An agreement is said to be a voidable contract if it is enforceable by law at the option of one or more of the parties thereto but not at the option of the other or others. Voidable contract.

We proceed to develop and explain these statements, so far as appears convenient at the outset of the work.

1. *Definition of Agreement.*—The first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention. But in order that their consent may make an agreement of which the law can take notice, other conditions must be fulfilled. The agreement must be, in our old English phrase, an act in the law: that is, it must be on the face of the matter capable of having legal effects. It must be concerned with duties and rights which can be dealt with by a court of justice. And it must be the intention of the parties that the matter in hand shall, if necessary, be so dealt with, or at least they must not have the contrary intention. An appointment between two friends to go out for a walk or to read a book together is not an agreement in the legal sense: for it is not meant to produce, nor does it produce, any new legal

Nature and scope of consent.

(b) This does not imply that every offer is revocable until acceptance. How far that is so is a question not of definition but of substantive law. "Offer" and

"proposal" are synonymous terms: "proposal" is often convenient as allowing "proposer" to be used as a correlative term rather than the legitimate but clumsy "offeror."

Obliga-
tion.

duty or right, or any change in existing ones (*c*). Again, there must not only be an act in the law, but an act which determines duties and rights of the parties. A consent or declaration of several persons is not an agreement if it affects only other people's rights, or even if it affects rights or duties of the persons whose consent is expressed without creating any obligation between them. The verdict of a jury or the judgment of a full Court is a concurrent declaration of several persons affecting legal rights; but it is not an agreement, since the rights affected are not those of the judges or jurymen. If a fund is held by the trustees of a will to be paid over to the testator's daughter on her marriage with their consent, and they give their consent to her marrying J. S., this declaration of consent affects the duties of the trustees themselves, for it is one of the elements determining their duty to pay over the fund. Still it is not an agreement, for it concerns no duty to be performed by any one of the trustees towards any other of them. There is a common duty to the beneficiary, but no mutual obligation. By obligation we mean the relation that exists between two persons of whom one has a private and peculiar right (that is, not a merely public or official right, or a right incident to ownership or a permanent family relation) to control the other's actions by calling upon him to do or forbear some particular thing (*d*). An agreement might

(*c*) Nothing but the absence of intention seems to prevent a contract from arising in many cases of this kind. A. asks B. to dinner and B. accepts. Here is proposal and acceptance of something to be done by B. at A.'s request, namely, coming to A.'s house at the appointed time, and the trouble and expense of doing this are ample consideration for A.'s promise to provide a dinner. Why is A. not legally bound to have meat and drink ready for B., so that if A. had forgotten his invitation and gone elsewhere B. should have a

right of action? Only because no legal bond was intended by the parties. It might possibly be said that these are really cases of contract, and that only social usage and the trifling amount of pecuniary interest involved keep them out of courts of justice. But I think Savigny's view, which is here adopted, is the better one. There is not a contract which it would be ridiculous to enforce, but the original proposal is not the proposal of a contract.

(*d*) Savigny, Syst. i. 338—9; Obl. i. 4, *seq.*

be defined, indeed, as purporting to create an obligation ; and the mark which distinguishes an obligation so created from any other kind of obligation is that its contents are wholly determined by the will of the parties (*e*). But for the purposes of English law we prefer to say (what is in effect the same) that an agreement contemplates something to be done or forborne by one or more of the parties for the use of the others or other. The word *use* (representing the Latin *opus* through an Anglo-French form *oepe*, not *usus*) is familiar in English law-books from early times in such a connexion as this.

The common intention of the parties to an agreement is a fact, or inference of fact, which, like any other fact, has to be proved according to the general rules of evidence. When it is said, therefore, that the true intent of the parties must govern the decision of all matters of contract, this means such an intent as a court of justice can take notice of. If A., being a capable person, so bears himself towards B. that a reasonable man in B.'s place would naturally understand A. to make a promise, and B. does take A.'s words or conduct as a promise, no further question can be made about what was passing in A.'s mind. "Mental acts or acts of the will," it has been well said, "are not the materials out of which promises are made" (*f*). Under such circumstances, as well as in certain other more special cases, the law does not allow a party to show that his intention was not in truth such as he made or suffered it to appear. But in the common and regular course of things the consent to which the law gives effect is real as well as apparent.

Proof of
consent.

2. *Ways of declaring Consent.*—Two distinct modes of the formation of an agreement are here specified. It is

Proposal
and ac-
ceptance.

(*e*) That is, their will as ascertained by the proper rules of interpretation, not necessarily a will

completely expressed on the face of the transaction.

(*f*) Langdell, Summary, § 180.

possible, however, to analyse and define agreement as constituted in every case by the acceptance of a proposal. In fact this is done in the Indian Contract Act. And it is appropriate to most of the contracts which occur in daily life, buying and selling, letting and hiring, in short all transactions which involve striking a bargain. One party proposes his terms; the other accepts, rejects, or meets them with a counter-proposal: and thus they go on till there is a final refusal and breaking off, or till one of them names terms which the other can accept as they stand. The analysis is presented in a striking form by the solemn question and answer of the Roman Stipulation, where the one party asked (specifying fully the matter to be contracted for): That you will do so and so, do you covenant? and the other answered with the same operative word: I covenant (*g*). Yet the importance of proposal and acceptance as elements of contract has, until of late years, been much more distinctly brought out in the Common Law than by writers on the modern civil law.

Is the
analysis
univer-
sally ap-
plicable?

It seems overstrained to apply this analysis to a case in which the consent of the parties is declared in a set form, as where they both execute a deed or sign a written agreement. Some say that, although there is no proposal or acceptance in the final transaction, the terms of the document must have been settled by a process reducible to the acceptance of a proposal; but this hardly suffices: for the formal instrument has a force apart from and beyond that of the negotiation which fixed its terms. And it may well be, and sometimes is the case, that the parties intend not to be legally bound to anything until their consent is formally declared. In such a case it cannot be said that the proposal and

(*g*) No doubt the formula *Spondeo?* *spondeo*, originally the only binding one, and almost certainly of religious origin, was in early times supposed to have a kind of magical

effect. But it was necessary that the stipulator should hear the promisor's answer. Cp. Palgrave, *Commonwealth of England*, 2, cxxxvii. cxli.

acceptance constitute the final and legal agreement. Take the common case of a lease. There is generally an enforceable agreement, constituted by letters or memorandum, before the lease is executed. But the lease itself is (besides its effect as a transfer of property) a new contract or series of contracts. In this who is the proposer and who the acceptor? Are we to say that the lessor is the proposer because in the common course he executes the lease before the lessee executes the counterpart? Or are we to take the covenants severally, and say that in each one the party with whom it is made is the proposer, and the party bound is the acceptor? What, again, if two parties are discussing the terms of a contract and cannot agree, and a third indifferent person suggests terms which they both accept? Shall we say that he who accepts them first thereby proposes them to the other? And what if they accept at the same moment? The case of competitors in a race who, by accepting rules laid down by the managing committee, become bound to one another to observe those rules (*h*), is even stronger. The truth is, as I venture to think, that the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind, and if the pursuit be obstinate, lands us in sheer fictions.

3. *Promise*.—Except in the case of simultaneous declaration just mentioned, a promise is regularly either the acceptance of an offer or an offer accepted. Where the promise is embodied in a deed, there is an apparent anomaly; for the deed is irrevocable and binding on the promisor from the moment of its execution by him, even before any acceptance by the promisee (*i*). But this

Effect of deed in making simple promise operative.

(*h*) *Clarke v. Earl of Dunraven* [1897] A. C. 59, 66 L. J. P. 1. Here we are driven to say that every party is an acceptor as regards every one who has sent in his name earlier, and a proposer as regards every

one who comes in later.

(*i*) *Xenos v. Wickham* (1886) L. R. 2 H. L. 296, 323; *Doe d. Garbons v. Knight* (1826) 5 B. & C. 671, 29 R. R. 355, and see Pref. to 29 R. R. v—ix.

depends on the peculiar nature of a deed in our law. The party who sets his hand and seal to a deed witnessing his promise does not, strictly speaking, thereby create an obligation, but rather declares himself actually bound, and that declaration is conclusive, as against himself, under normal conditions. In fact it is only in modern times that special defences, on the ground of fraud and the like, have been allowed to avail a man against his own deed. Thus the questions of consent and acceptance are not open, as ordinary questions of fact, to any discussion. The party has recorded his own promise in solemn form, and cannot require proof that any other positive condition was satisfied. As matter of history, the very object of the Anglo-Norman writing under seal was to dispense with any other kind of proof, and to substitute the authenticated will of the parties themselves for an appeal to the hazards of oath, ordeal, or judicial combat. It is not that an anomalous liability is created; the contracting party is estopped (special and exceptional causes excepted) from disputing that he is liable. Not the promise, but the deed itself, is irrevocable and operative without need of external confirmation. Whether it is convenient, on the whole, for the purposes of modern law to retain the deed with its ancient qualities is a question beyond our present limits (*j*).

Restric-
tion of
contract
to enforce-
able agree-
ments.

4. *Definition of Contract.*—The term *contract* is here confined to agreements enforceable by law. This restriction, suggested perhaps by the Roman distinction between *contractus* and *pactum*, is believed to have been first introduced in English by the Indian Contract Act. It seems a manifest improvement, and free from the usual drawbacks of innovations in terminology, as it makes the legal meaning of the words more precise without any violent interference with their accustomed use.

(*j*) The old law has been altered in various ways in many American States.

5. *Void Agreements*.—The distinction between *void* and *voidable* transactions is a fundamental one, though it is often obscured by carelessness of language. An agreement or other act which is *void* has from the beginning no legal effect at all, save in so far as any party to it incurs penal consequences, as may happen where a special prohibitive law both makes the act void and imposes a penalty. Otherwise no person's rights, whether he be a party or a stranger, are affected. A *voidable* act, on the contrary, takes its full and proper legal effect unless and until it is disputed and set aside by some person entitled so to do. The definitions of the Indian Contract Act on this head are simpler in form than those given above: but certain peculiarities of English law prevent us from adopting the whole of them as they stand. It is not correct as an universal proposition in England that "an agreement not enforceable by law is said to be void," for we have agreements that cannot be sued upon, and yet are recognized by law for other purposes and have legal effect in other ways (*k*).

Void
agree-
ment; dis-
tinction of
void and
voidable.

6. *Voidable Contracts*.—The definition here given is from the Indian Contract Act. The idea is not an easy one to express in terms free from objection. Perhaps it would be better to say that a voidable contract is an agreement such that one of the parties is entitled at his option to treat it as never having been binding on him. The Anglo-Indian definition certainly covers rather more than the ordinary use of the terms. Cases occur in English law where, by the effect of peculiar enactments, there is a contract enforceable by one party alone, and yet we should not naturally call it a voidable contract. An example is an agreement required by the Statute of Frauds to be in writing, which has been signed by one party and not by the other. Here the party who has signed is bound and

Voidable
contract.

(*k*) See Ch. XIII. below.

the other is free. "Voidable contract" seems not exactly the appropriate name for such a state of things. And it may even be said that a contract which has been completely performed on one side is literally "enforceable by law at the option of one of the parties" only. But the definition as it stands cannot practically mislead (*l*).

Consideration.

Consideration is sometimes treated as if it were among the necessary elements of an agreement (*m*). But the conception, in the generality with which we use it, combined with its restriction within the limits of exchangeable value of some kind, is peculiar to the Common Law. It does not exist in the jurisprudence of the Continent or of Scotland. In our law we require, for the validity of an informal contract, not merely agreement or deliberate intention, but bargain; a gratuitous promise is not enforceable unless included in the higher obligation of a deed. The rules as to proposal and acceptance cannot be fully understood without bearing this in mind; still the requirement of consideration is a condition imposed by positive law and has nothing universal or necessary about it.

Hereafter a fuller discussion will be given: for the present it may serve to describe consideration as an act or forbearance, or the promise thereof, which is offered by one party to an agreement, and accepted by the other, as an inducement to that other's act or promise.

Special rules governing proposal and acceptance.

Proposal and acceptance, though not strictly necessary parts of the general conception of Contract, are in practice the normal and most important elements. When agreement has reached the stage of being embodied in a form of

(*l*) There is a similar but slighter difficulty about the use of the word *void*. A contract when it is fully performed ceases to have legal effect; it is *discharged*, but there is something harsh in saying that it becomes void, a term suggestive of

inefficacy rather than of completed effect. Hence in the fifth definition I have introduced the word *discharged* as an alternative.

(*m*) Thus it is defined in the interpretation clause of the Indian Contract Act.

words adopted by both parties, the contents of the document and the consent of the parties are generally simple and easily proved facts: and the only remaining question (assuming the other requirements of a valid contract to be satisfied) is what the words mean. The acceptance of a proposal might seem at first sight an equally simple fact. But the complexity of human affairs, the looseness of common speech, the mutability of circumstances and of men's intentions, and the exchange of communications between parties at a distance, raise questions which have to be provided for in detail.

We may have to consider separately whether the offer of a contract was made; what the terms of that offer were; whether there was any acceptance of it; and whether the acceptor was a person to whom the offer was made.

Communications in general.

The proposal or acceptance of an agreement may be communicated by words or by conduct, or partly by the one and partly by the other. In so far as a proposal or acceptance is conveyed by words, it is said to be express. In so far as it is conveyed by conduct, it is said to be tacit.

Proposal
and ac-
ceptance
—Express
or tacit.

It would be as difficult as it is needless to adduce distinct authority for this statement. Cases are of constant occurrence, and naturally in small matters rather than in great ones, where the proposal, or the acceptance, or both, are signified not by words but by acts. For example, the passenger who steps into a ferry-boat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off. In the case of obtaining a chattel from an automatic machine (where putting in our coin is the acceptance of a standing offer made by the owner of the machine) there is no possibility of accepting in words.

Distinction of
tacit from
fictitious
promises.

A promise made in this way is often said to be implied: but this tends to obscure the distinction of the real though tacit promise in these cases from the fictitious promise "implied by law," as we shall immediately see, in certain cases where there is no real contract at all, but an obligation *quasi ex contractu*, and in others where definite duties are annexed by rules of law to special kinds of contracts or to relations arising out of them. Sometimes it may be difficult to draw the line. "Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, *the law will imply* [fictitious contract] *or the jury may infer* [true contract] a promise by each party to do what is to be done by him" (*n*). It was held in the case cited that an innkeeper promises in this sense to keep his guests' goods safely. The case of a carrier is analogous. So where A. does at B.'s request something not apparently illegal or wrongful, but which in fact exposes A. to an action at the suit of a third person, it seems to be not a proposition of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A. (*o*).

If A. with B.'s knowledge, but without any express request, does work for B. such as people as a rule expect to be paid for, if B. accepts the work or its result, and if there are no special circumstances to show that A. meant to do the work for nothing or that B. honestly believed that such was his intention, there is no difficulty in inferring a promise by B. to pay what A.'s labour is worth. And this is a pure inference of fact, the question being whether B.'s conduct has been such that a reasonable man in A.'s position would understand from it that B. meant to treat the work as if done to his express order. The

(*n*) Per Cur. *Morgan v. Ravey*
(1861) 6 H. & N. 265, 30 L. J. Ex.
131.

(*o*) *Dugdale v. Lovering* (1875)
L. R. 10 C. P. 196, 44 L. J. C. P.
197.

doing of the work with B.'s knowledge is the proposal of a contract, and B.'s conduct is the acceptance. The like inference cannot be made if the work is done without B.'s knowledge. For by the hypothesis the doing of the work is not a proposal, not being communicated at the time: B. has no opportunity of approving or countermanding it, and cannot be bound to pay for it when he becomes aware of the facts, although he may have derived some benefit from the work; it may be impossible to restore or reject that benefit without giving up his own property (*p*). If A. of his own motion sends goods to B. on approval, this is an offer which B. accepts by dealing with the goods as owner. If he does not choose to take them, he is not bound to return them; nor indeed is he bound to take any active care of them till A. reclaims them (*q*).

But it does not follow that because there is no true contract, there may not be cases falling within this general description in which it is just and expedient that an obligation analogous to contract should be imposed upon the person receiving the benefit. In fact there are such cases: and as the forms of our common law did not recognize obligations *quasi ex contractu* in any distinct manner, these cases were dealt with by the fiction of an implied previous request, which often had to be supplemented (as in the action for money had and received) by an equally fictitious promise. The promise, actual or fictitious, was then supposed to relate back to the fictitious request, so that the transaction which was the real foundation of the matter was treated as forming the consideration in a fictitious contract of the regular type. Here, as in many other instances, the law was content to rest in a compromise between the forms of pleading and the convenience

Duties
quasi ex
contractu
in English
law.

(*p*) Cp. *dicta* of Pollock C.B. 25 L. J. Ex. at p. 332. The effect of a subsequent express promise to pay for work already done comes under the doctrine of Considera-

tion.

(*q*) It is prudent, however, to inform the sender that the goods sent without request are at his disposal and risk.

Indian
Contract
Act deals
with them
sepa-
rately.

of mankind. These fictions have long ceased to appear on the face of our pleadings, but they have become so established in legal language that it is still necessary to understand them (*r*). The Indian Act provides for matters of this kind more simply in form and more comprehensively in substance than our present law, by a separate chapter, entitled "Of certain Relations resembling those created by Contract" (ss. 68—72, cp. s. 73). The term *constructive contract* might properly be applied to these obligations; it would be exactly analogous to "constructive possession" and "constructive notice." But it has never come into use. The term *Quasi-Contract* is now current in America and recognized in England.

Perform-
ance of
conditions
&c., as ac-
ceptance.

A corollary from the general principle of tacit acceptance, which in some classes of cases is of considerable importance, is thus expressed by the Indian Contract Act (s. 8):—

"Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal."

Offers by
advertise-
ment.

This rule contains the true legal theory of offers of reward made by public advertisement for the procuring of information, the restoration of lost property, and the like. On such offers actions have many times been brought with success by persons who had done the things required as the condition of obtaining the reward.

It appears to have been once held that even after performance an offer thus made did not become a binding promise, because "it was not averred nor declared to whom the promise was made" (*s*). But the established modern doctrine is that there is a contract with any person who

(*r*) For details see notes to *Lamp-
leigh v. Braithwaite* in 1 Sm. L. C.,
and *Osborne v. Rogers*, 1 Wms.

Saund. 357.

(*s*) Noy, 11; 1 Rolle Ab. 6 M.
pl. 1.

performs the condition mentioned in the advertisement (*t*). That is, the advertisement is a proposal which is accepted by performance of the conditions. It is an offer to become liable to any person who happens to fulfil the contract of which it is the offer (*u*). Until some person has done this, it is a proposal and no more. It ripens into a promise only when its conditions are fully satisfied. As Sir W. Anson has well put it, "an offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person" (*x*).

In the same manner each bidding at a sale by auction is a proposal; and when a particular bid is accepted by the fall of the hammer (but not before), there is a complete contract with the particular bidder to whom the lot is knocked down (*y*).

The principle is sufficiently clear, but its application is not wholly free from difficulties. These are partly reducible to questions of fact or of interpretation, but partly arise from decisions which appear to give some countenance to a fallacious theory. Difficulties in working out the principle.

First, we have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration (*z*). This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction. Distinction between offer and invitation of offers.

(*t*) *Williams v. Carwardine* (1833) 4 B. & Ad. 621, 38 R. R. 328.

(*u*) Per Willes J. *Spencer v. Harding* (1870) L. R. 5 C. P. 563. See too *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley L.J. at p. 262, per Bowen L.J. at p. 268, 62 L. J. Ch. 257.

(*x*) *Principles of the English Law of Contract*, p. 39, 9th ed. We have no special term of art for a proposal thus made by way of general request or invitation to all

men to whose knowledge it comes. The Germans call it *Auslobung*.

(*y*) *Payne v. Cave* (1789) 3 T. R. 148, 1 R. R. 679. Prof. Langdell (Summary, § 19) thinks it would have been better to hold that every bid constitutes "an actual sale, subject to the condition that no one else shall bid higher."

(*z*) In German this is *Aufforderung zu Anträgen* as opposed to *Antrag*.

Evidently it may be an important one, but due weight has not always been given to it.

The proposal of a definite service to be done for reward, which is in fact a request (in the sense of the ordinary English law of contract) for that particular service, though not addressed to any one individually, is quite different in its nature from a declaration to all whom it may concern that one is willing to do business with them in a particular manner. The person who publishes such an invitation does indeed contemplate that people who choose to act on it will do whatever is necessary to put themselves in a position to avail themselves of it. But acts so done are merely incidental to the real object; they are not elements of a contract but preliminaries. It does not seem reasonable to construe such preliminaries into the consideration for a contract which the parties had no intention of making. Yet there are some modern decisions which seem to disregard the distinction between mere invitations or declarations of intention and binding contracts (*a*). We shall now examine these cases.

Examina-
tion of
cases:
Denton v.
G. N. R.
Co.

In *Denton v. G. N. Railway Co.* (*b*), the facts were shortly these: The plaintiff had come from London to Peterborough, had done his business there, and wanted to go on to Hull the same night. He had made his arrangements on the faith of the company's current time-tables, and presented himself in due time at the Peterborough station, applied for a ticket to Hull by a train advertised in those tables as running to Hull at 7.20 p.m., and offered to pay the proper fare. The defendant company's clerk refused to issue such a ticket, for the reason that the 7.20 train no longer went to Hull. The fact was that beyond Milford Junction the line to Hull belonged to the North Eastern Railway Company, who formerly ran a

(*a*) Compare the judgments in *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286, 42 L. J. Q. B. 171.

(*b*) (1856) 5 E. & B. 860, and better in 25 L. J. Q. B. 129, where the case stated is given at length.

train corresponding with the Great Northern train, for which the Great Northern Railway Company issued through tickets by arrangement between the two companies. This corresponding train had now been taken off by the N. E. R. Co., but the G. N. R. time-table had not been altered. The plaintiff was unable to go further than Milford Junction that night, and so missed an appointment at Hull and sustained damage. The cause was removed from a County Court into the Queen's Bench, and the question was whether on the facts as stated in a case for the opinion of the Court the plaintiff could recover (c).

It was held by Lord Campbell C.J. and Wightman J. that when anyone offered to take a ticket to any of the places to which the train was advertised to carry passengers the company contracted with him to receive him as a passenger to that place according to the advertisement. Lord Campbell treated the statement in the time-table as a conditional promise which on the condition being performed became absolute. This proposition, reduced to exact language, amounts to saying that the time-table is a proposal, or part of a proposal, addressed to all intending passengers and sufficiently accepted by tender of the fare at the station in time for the advertised train. Crompton J. (d) did not accept this view, nor was it necessary to the actual decision: for the Court had only to say whether on the given facts the plaintiff could succeed in any form of action, and they were unanimously of opinion that there was a good cause of action in tort for a false representation; an opinion itself questionable, but not in this place (e).

In *Warlow v. Harrison* (f) a sale by auction was

Warlow v. Harrison.

(c) As to the measure of damages, which here was not in dispute, see *Hamlin v. G. N. R. Co.* (1856) 1 H. & N. 408, 26 L. J. Ex. 20 (where a ticket having been taken there was an unquestionable contract).

(d) The fuller report of his judgment is that in 5 E. & B.

(e) See Pollock on Torts, 6th ed. 290, 518.

(f) (1858-9) 1 E. & E. 295, 28 L. J. Q. B. 18, in Ex. Ch. 1 E. & E. 309, 29 L. J. Q. B. 14.

announced as without reserve, the name of the owner not being disclosed. The lot was put up, but in fact bought in by the owner. The plaintiff, who was the highest real bidder, sued the auctioneer as on a contract to complete the sale as the owner's agent. The Court of Queen's Bench held that this was wrong; the Court of Exchequer Chamber affirmed the judgment on the pleadings as they stood, but thought the facts did show another cause of action. Watson and Martin BB. and Byles J. considered that the auctioneer contracted with the highest *bona fide* bidder that the sale should be without reserve. They said they could not distinguish the case from that of a reward offered by advertisement, or of a statement in a time-table, thus holding in effect (contrary to the general rule as to sales by auction) that where the sale is without reserve the contract is completed not by the acceptance of a bidding, but by the bidding itself, subject to the condition that no higher *bona fide* bidder appears. In other words, every bid is in such a case not a mere proposal but a conditional acceptance. Willes J. and Bramwell B. preferred to say that the auctioneer by his announcement warranted that he had authority to sell without reserve, and might be sued for a breach of such warranty. The result was that leave was given to the plaintiff to amend and proceed to a new trial, which however was not done (g). The opinions expressed by the judges, therefore, are not equivalent to the actual judgment of a Court of Error, and have been in fact regarded with some doubt in a later case where the Court of Queen's Bench decided that at all events an auctioneer whose principal is disclosed by the conditions of sale does not contract personally that the sale shall be without reserve (h). Later, again, the same Court held that when

Doctrine
subse-
quently
doubted
and not
extended.

(g) The parties agreed to a *stet processus*; see note in the L. J. report.

(h) *Mainprice v. Westley* (1865) 6 B. & S. 420, 34 L. J. Q. B. 229.

But in *Johnston v. Boyes* [1899] 2 Ch. 73, 68 L. J. Ch. 425, Cozens-Hardy J. was prepared to hold on the authority of *Warlow v. Harrison* that there is a contract

an auctioneer in good faith advertises a sale of certain goods, he does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold (i). In an analogous case (k) it was decided that a simple offer of stock in trade for sale by tender does not amount to a contract to sell to the person who makes the highest tender.

The doctrine of these cases, though capable, as we have seen, of being expressed in a manner conformable to the normal analysis of contract, goes to the utmost limit warranted by sound principle, and is not likely to be extended. If a man advertises that he has goods to sell at a certain price, does he contract with any one who comes and offers to buy those goods that until further notice communicated to the intending buyer he will sell them at the advertised price? (l). Again, does the manager of a theatre contract with every one who comes to the theatre and is ready to pay for a place that the piece announced shall be performed? or do directors or committee-men who summon a meeting contract with all who come that the meeting shall be held? Offers to negotiate, in other words expressions of willingness to consider offers, must not be confounded with offers to be bound (m).

Difficulties of
Denton v.
G. N. R.
Co. and
Warlow v.
Harrison.

The distinction between the proposal of a contract and the mere preliminaries is clearly brought out by a later decision of the Court of Appeal. A "proposal" in the usual form was made to a life assurance society; the actuary wrote a letter stating that the proposal had been accepted at a certain premium, but adding this note: "No

Canning v.
Farquhar.

by the vendors with the highest bidder that he shall be the purchaser, distinct from the contract of sale. The plaintiff failed on another point.

(i) *Harris v. Nickerson* (1873)
L. R. 8 Q. B. 286, 42 L. J. Q. B. 171.

(k) *Spencer v. Harding* (1870)

L. R. 5 C. P. 561, 39 L. J. C. P. 332. In each of these cases we have the unanimous decision of a strong Court.

(l) See per Crompton J. in *Denton v. G. N. R. Co. supra*.

(m) See per Bowen L.J. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, 268.

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assurance can take place until the first premium is paid." Afterwards, and before the time limited for that payment, an accident happened to the assured which affected his health, and the society, being informed of this, refused the premium when tendered. It was held that they were entitled to do so. The letter of acceptance did not conclude a contract, first, because the amount of premium was then first specified, and the assured had therefore not consented to that material term of the agreement; next, because of the express declaration of contrary intention (*n*).

Another matter for remark is the effect of notice of revocation. Suppose the traveller had seen and read a new and correct edition of the time-table in the booking-office immediately before he offered to take his ticket. This would clearly have been a revocation of the proposal of the company held out in the incorrect time-table, and accordingly no contract could arise. Similarly if on putting up a particular lot the auctioneer expressly retracted as to that lot the statement of the sale being without reserve, there could be no such contract with the highest *bona fide* bidder as supposed in *Warlow v. Harrison* (*o*): yet the traveller's or bidder's grievance would be the same.

Difficulty
of fixing
the sup-
posed con-
tract.

There is also difficulty in determining what are the contents and consideration of the contract supposed to be made. In the case of the time-table, for example, it is not sufficient to say that the statements of the table are a term in the company's ordinary contract to carry the passenger. They may well be so after he has taken his ticket. But here we have a contract said to be concluded by the

(*n*) *Canning v. Farquhar* (1886) 16 Q. B. Div. 727, 55 L. J. Q. B. 225; cp. *Wallace's case* [1900] 2 Ch. 671, 69 L. J. Ch. 777 (application for shares under an amalgamation agreement by a shareholder in the old company).

(*o*) The Continental doctrine that the revocation must be so communi-

cated as to amount to reasonable notice is not admissible in our law: see note to *Frost v. Knight* (1870) L. R. 5 Ex. at p. 337, and pp. 26, 27, below. As to the somewhat analogous suggestion made in that case, see s. c. in Ex. Ch. L. R. 7 Ex. at p. 117.

mere demand of a ticket and tender of the fare, which, therefore, cannot be the ordinary contract to carry. So in the case of the auction we have a contract alleged to be complete not on the acceptance but on the making of a bid. The anomalous character of these contracts may further be illustrated by considering whether it would be possible to maintain a remedy *ex contractu* in the case of a merely capricious refusal to issue tickets or hold the sale, as the case might be. On the whole it seems that at least some of the *dicta* in this class of cases cannot be supported.

Another difficulty (though for English lawyers hardly a serious one) is raised by the suggestion that in these cases the first offer or announcement is not a mere proposal, but constitutes at once a kind of floating contract with the unascertained person, if any, who shall fulfil the prescribed condition. Savigny quite justly held that on this theory the right of action could not be supported: there cannot be a *vinculum iuris* with one end loose; but he strangely missed the true explanation (*p*). To a certain extent, however, this notion of a floating obligation is countenanced by the language of the judges in the cases above discussed, and also in the much earlier case of *Williams v. Carwardine* (*q*). There a reward had been offered by the defendant for information which should lead to the discovery of a murder. A statement which had that effect was made by the plaintiff, but not (as the jury found) with a view to obtaining the reward; it does not appear to whom it was made, or whether with any knowledge that a reward had been offered. The Court held, nevertheless, that the plaintiff had a good cause of action, because "there was a contract with any person who performed the condition mentioned in the advertisement," and the motive with which the information was given was immaterial: but on

Must there be a real acceptance?

Theory of floating obligation.

(*p*) Obl. 2, 90. Yet within a few pages he does give the true analysis for the not dissimilar case of a sale by auction.

(*q*) (1833) 4 B. & Ad. 621, s. c. at N. P. 5 C. & P. 566, 38 R. R. 328.

this it must be observed that the question is not of motive but of intention. The decision seems to set up a contract without any privity between the parties. Such a doctrine cannot now be received (*r*), though the decision may have been right on the facts. There cannot be an acceptance constituting a contract without any communication of the proposal to the acceptor, or of the acceptance to the proposer. The question may arise whether the party claiming the reward has in fact performed the required condition according to the terms of the advertisement. In *Carlill v. Carbolic Smoke Ball Co.* (*s*) it arose in a curious manner. The advertisement of a remedy for influenza and similar diseases offered a sum of money to any one who should contract such disease "after using" the remedy according to the directions supplied with it, and for a certain time. A buyer who used the remedy as directed, and caught influenza while still using it, was held entitled to the sum offered, notwithstanding the argument strenuously urged for the defendant that the offer was too vague to be taken seriously, and the performance could not be verified.

Revoca-
tion of
offer by
advertise-
ment.

The Supreme Court of the United States has held that a general proposal made by public announcement may be effectually revoked by an announcement of equal publicity, such as an advertisement in the same newspaper, even as against a person who afterwards acts on the proposal not knowing that it has been revoked. For "he should have known," it is said, "that it could be revoked in the manner in which it was made" (*t*). In other words, the proposal is treated as subject to a tacit condition that it may be revoked by an announcement made by the same means.

(*r*) Cf. Langdell, § 3, and American authorities collected in 28 Am. Law Reg. 2d S. 116. The solitary modern case of *Gibbons v. Proctor* (1891) 64 L. T. 594, would no doubt support or even extend *Williams v.*

Carwardine if it could be relied on. But it cannot be law as reported.

(*s*) [1893] 1 Q. B. 256, 62 L. J. Q. B. 257, C. A.

(*t*) *Shuey v. United States* (1875) 92 U. S. 73.

This may be a convenient rule, and may perhaps be supported as a fair inference of fact from the habits of the newspaper-reading part of mankind: yet it seems a rather strong piece of judicial legislation.

Other kinds of general proposals have also been dealt with as capable of acceptance by any one to whose hands they might come. Other general proposals.

In *Ex parte Asiatic Banking Corporation* (u), the following letter of credit had been given by Agra and Masterman's Bank to Dickson, Tatham and Co. *Ex parte Asiatic Banking Corporation.*

"No. 394. You are hereby authorized to draw upon this bank at six months' sight, to the extent of £15,000 sterling, and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394, of the 31st of October, 1865."

The Asiatic Banking Corporation held for value bills drawn on the Agra and Masterman's Bank under this letter; the Bank stopped payment before the bills were presented for acceptance, and Dickson, Tatham and Co. were indebted to the Bank in an amount exceeding what was due on the bills: but the Corporation claimed nevertheless to prove in the winding-up for the amount, one of the grounds being "that the letter shown to the person advancing money constituted, when money was advanced on the faith of it, a contract by the Bank to accept the bills." Cairns L.J. adopted this view, holding that the letter did amount to "a general invitation" to take bills drawn by Dickson, Tatham and Co. on the Agra and Masterman's Bank, on the assurance that the Agra and Masterman's Bank would accept such bills on presentation; and that the acceptance of the offer in this letter by the Asiatic Banking Corporation constituted a binding legal contract

(u) (1867) L. R. 2 Ch. 391, 36 L. J. Ch. 222. Cp. *Bhugwandass v. Netherlands, &c. Insce. Co.* (1888) 14 App. Ca. (J. C.) 83, decided on

the ground that the "open cover" was a proposal of insurance addressed to any one having insurable interest in the cargo.

This case
free from
the diffi-
culty in
Denton v.
G. N. R.
Co.

against the Agra and Masterman's Bank (*x*). The difficulties above discussed do not seem to exist in this case. From an open letter of credit (containing too in this instance an express request to persons negotiating bills under it to indorse particulars) there may be inferred without any violence either to law or to common reason a proposal or request by the author of the letter to the mercantile public to advance money on the faith of the undertaking expressed in the letter. This undertaking must then be treated as addressed to any one who shall so advance money: the thing to be performed by way of consideration for the undertaking is definite and substantial, and is in fact the main object of the transaction. If any question arose as to a revocation of the proposal, it would be decided by the rules which apply to the revocation of proposals made by letter in general (*y*).

Statute of
Frauds
and con-
tracts by
advertise-
ment:
dicta in
Williams
v. Byrnes.

The bearing of the Statute of Frauds on these contracts made by advertisements or general offers was discussed incidentally in a case brought before the Judicial Committee of the Privy Council on appeal from the Supreme Court of New South Wales (*z*). It is settled that the requirements of the statute in the cases where it applies are generally not satisfied unless the written evidence of the contract shows who both the contracting parties are. But it was suggested in the Colonial Court that in the case of a proposal made by advertisement, where the

(*x*) In *Scott v. Pilkington* (1862) 2 B. & S. 11, 31 L. J. Q. B. 81, on the other hand, an action was brought on a judgment of the Supreme Court of New York on a very similar state of facts. The decision of the English Courts was that the law applicable to the case was the law of New York, and that the judgment having been given by a court of competent jurisdiction in a case to which the local law was properly applicable, there was no room to question its correctness in an English court. So far

as any opinion was expressed by the Court as to what should have been the decision on the same facts in a case governed by the law of England, it was against any right of action at law being acquired by the bill-holders. This however was by the way, and as a concession to the defendants, and is therefore no positive authority.

(*y*) See however *Shuey v. United States*, p. 22, above.

(*z*) *Williams v. Byrnes* (1863) 1 Moo. P. C. N. S. 154.

PROMISES BY GENERAL OFFER.

nature of the contract (*e.g.* a guaranty) was such as to bring it within the statute, the advertisement itself might be a sufficient memorandum, the other party being indicated as far as the nature of the transaction would admit (*a*). The Judicial Committee, however, showed a strong inclination to think that this view is not tenable, and that in such a case the evidence required by the statute would not be complete without some further writing to show who in particular had accepted the proposal. It was observed that as a matter of fact the cases on advertisements had been of such a kind that the statute did not apply to them, and it was a mere circumstance that the advertisement was in writing (*b*). We are not aware of the point having arisen in any later case.

It is possible for a contract to be formed without any direct communication between the parties or any persons who in an ordinary sense are their agents. Where competitors enter for a club race under express rules prescribed or adopted by the managing committee, and those rules declare that any competitor breaking them shall be liable for damages arising therefrom, this is sufficient to create a mutual contract between the competitors to be liable for and discharge any such damages (*c*). Here the secretary of the club who receives the entries may be regarded as an agent to receive, as between the competitors, the offer of every competitor to be bound by the rules, and the acceptance of every other competitor; and his authority to do so is implied in the nature of the transaction. There may be cases of this kind in which it would be hard, if the question were raised, to determine whether the parties intended to create a legal or a merely honorary obligation.

Formation
of contract
by indirect
communi-
cation.

(*a*) Per Stephen C.J. at pp. 167, 184.

(*b*) See at p. 198. The language of the headnote is misleading; there is no suggestion in the judgment of any such proposition of law as that the Statute of Frauds is not ap-

plicable to contracts made in this manner.

(*c*) *Clarke v. Earl of Dunraven* (*The "Satanita"*) [1897] A. C. 59, 66 L. J. P. 1. The only question seriously argued in the H. L. was on the construction of the rules.

Revocation.

Revoca-
tion of
offer.

An offer may be revoked at any time before acceptance but not afterwards.

Cooke v.
Oxley.

For before acceptance there is no agreement, and therefore the proposer cannot be bound to anything (*d*). So that even if he purports to give a definite time for acceptance, he is free to withdraw his proposal before that time has elapsed. He is not bound to keep it open unless there is a distinct contract to that effect, founded on a distinct consideration. If in the morning A. offers goods to B. for sale at a certain price, and gives B. till four o'clock in the afternoon to make up his mind, yet A. may sell the goods to C. at any time before four o'clock, so long as B. has not accepted his offer (*e*). But if B. were to say to A.: "At present I do not know, but the refusal of your offer for a definite time is worth something to me; I will give you so much to keep it open till four o'clock," and A. were to agree to this, then A. would be bound to keep his offer open, not by the offer itself, but by the subsequent independent contract (*f*). If A. on Wednesday hands to

(*d*) The same rule applies to a proposal to vary an existing agreement: *Gilkes v. Leonino* (1858) 4 C. B. N. S. 485.

(*e*) Admitted in *Cooke v. Oxley* (1790) 1 R. R. 783, 3 T. R. 653; affd. in Ex. Ch., see note; Finch Sel. Ca. 2nd ed. 85. The decision goes farther, and has been the subject of much criticism. For the conflicting views see Benjamin on Sale, 69 (4th ed.) and Langdell's Summary, § 182. I now agree with Mr. Langdell that it cannot be supported in any sense. If the defendant's offer had been revoked before the plaintiff's acceptance, it was for the defendant to plead and prove it. The decision would have been right if the action had been on a promise to keep the offer open, as seems to be supposed by Lush J. in *Stevenson v. McLean*

(1880) 5 Q. B. D. at p. 351, 49 L. J. Q. B. 701. But the action was for not delivering goods, as on a complete bargain and sale; and this was insisted upon in the argument. The Court may possibly have supposed that acceptance of an offer made any appreciable time before was not complete without a fresh sign of consent from the proposer. Cp. *Kennedy v. Lee* (1817) 3 Mer. 441, 17 R. R. 110.

(*f*) We find something like this in early Germanic law, where earnest on a sale was not payment on account of a completed contract, but the price of the seller's forbearance to sell to any other person for a limited time. Heusler, *Inst. des D. P. R.* ii. 256, cp. *Glanv.* x. 14, showing the law to be then still doubtful in England.

B. a memorandum offering to sell a house at a certain price, with a postscript stating that the offer is to be "left over" till nine o'clock on Friday morning, A. may nevertheless sell the house to C. at any time before the offer is accepted by B. If B., with notice of A.'s dealing with C., tenders a formal acceptance to A., this is inoperative (*g*). It is different in modern Roman law. There a promise to keep a proposal open for a definite time is treated as binding, as indeed there appears no reason why it should not be in a system to which the doctrine of consideration is foreign: nay, there is held in effect to be in every proposal an implied promise to keep it open for a reasonable time (*h*). In our own law the effect of naming a definite time in the proposal is simply negative and for the proposer's benefit; that is, it operates as a warning that an acceptance will not be received after the lapse of the time named, not as an undertaking that if given sooner it shall be. In fact, the proposal so limited comes to an end of itself at the end of that time, and there is nothing for the other party to accept. This leads us to the next rule, namely:—

Dickinson v. Dodds.

Conditions of Offer.

The proposer may prescribe a certain time within which the proposal is to be accepted, and the manner and form in which it is to be accepted. If no time is prescribed, the acceptance must be communicated to him within a reasonable time. In neither case is the acceptor answerable for any delay which is the consequence of the proposer's own default. If no manner or form is prescribed, the acceptance may be communicated in any reasonable or usual manner or form.

Determination of offer by lapse of prescribed or reasonable time.

This is almost self-evident, standing alone; we shall see

(*g*) *Dickinson v. Dodds* (1876) 2 Ch. Div. 463, 45 L. J. Ch. 777. The case suggests, but does not decide, another question, which

will be presently considered. *Contra* Langdell, Summary, p. 244; and on principle perhaps rightly.
(*h*) See L. R. 5 Ex. 337, *n*.

the importance of not losing sight of it in dealing with the difficulties to be presently considered. Note, however, that though the proposer may prescribe a form or time of *acceptance*, he cannot prescribe a form or time of *refusal*, so as to fix a contract on the other party if he does not refuse in some particular way or within some particular time (*i*).

Among other conditions, the proposal may prescribe a particular *place* for acceptance, and if it does so, an acceptance elsewhere will not do (*k*). The question in cases of this kind is whether the condition as to time, place, or manner of acceptance was in fact part of the terms of the proposal.

There is direct authority for the statement that the proposal must at all events be taken as limited to a reasonable time (*l*) ; nor has it ever been openly disputed. The rule is obviously required by convenience and justice. It may be that the proposer has no means of making a revocation known (*e. g.*, if the other party changes his address without notice to him, or goes on a long journey), and he cannot be expected to wait for an unlimited time. Words of present obligation (but not capable of operating to that effect) have been held to constitute an offer with limit of time (*m*).

Limits of Revocation.

Revoca-
tion of
proposal
must be
communi-
cated
before ac-
ceptance.

A proposal is revoked by communication to the other party of the proposer's intention to revoke it, and the revocation can take effect only when that communication is made before acceptance.

(*i*) *Felthouse v. Bindley* (1862) 11 C. B. N. S. 869, 875, 31 L. J. C. P. 204.

(*k*) *Eliason v. Henshaw* (1819) (Sup. Ct. U. S.) 4 Wheat. 225, Langdell, Sel. Ca. on Cont. 48, Finch Sel. Ca. 56.

(*l*) *Baily's case* (1868) L. R. 5 Eq. 428, L. R. 3 Ch. 592, 37 L. J. Ch. 255; *Ramsgate Hotel Co. v. Montefiore*; *same Co. v. Goldsmid* (1866) L. R. 1 Ex. 109, 35 L. J. Ex. 90.

(*m*) *Hindley's case* [1896] 2 Ch. 121, 65 L. J. Ch. 591, C. A.

The communication may be either express or tacit, and notice received in fact, whether from the proposer or from any one in his behalf or otherwise, is a sufficient communication.

A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn (*n*). But that person's refusal or counter-offer puts an end to the original offer (*nn*).

The first point under this head is that an express revocation communicated after acceptance, though determined upon before the date of the acceptance, is too late. This was decided so lately as in 1880 in two distinct cases (*o*). It will suffice to give shortly the facts of the earlier one (*p*). The defendants at Cardiff wrote to the plaintiffs at New York on the 1st of October, 1879, offering for sale 1000 boxes of tinplates on certain terms. Their letter was received on the 11th, and on the same day the plaintiffs accepted the offer by telegraph, confirming this by a letter sent on the 15th. Meanwhile the defendants on the 8th of October had posted a letter withdrawing their offer of the 1st: this reached the plaintiffs on the 20th. The plaintiffs insisted on completion of the contract; the defendants maintained that there was no contract, the offer having been, in their view, withdrawn before the acceptance was either received or despatched. Lindley J. stated as follows the questions to be considered: "1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?" The

Revocation after acceptance too late.
Byrne v. Van Tienhoven.

(*n*) Lord Herschell, *Henthorn v. Fraser* [1892] 2 Ch. 27, 31, 61 L. J. Ch. 373, 66 L. T. 439.

(*nn*) *Hyde v. Wrench* (1840) 3 Beav. 334, 52 R. R. 144.

(*o*) (1880) *Byrne v. Van Tienhoven*, 5 C. P. D. 344, 49 L. J. C. P. 316,

Finch Sel. Ca. 104; *Stevenson v. McLean* (1880) 5 Q. B. D. 346, 49 L. J. Q. B. 701; *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373, fully confirms these decisions.

(*p*) *Byrne v. Van Tienhoven*, last note.

first he answered in the negative, on the principle "that a state of mind not notified cannot be regarded in dealings between man and man, and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all." The second he likewise answered in the negative, on grounds of both principle and convenience, and notwithstanding an apparent, but only apparent, inconsistency with the rule as to acceptances by letter which will be presently considered. This doctrine has been accepted by the Supreme Court of the United States (*q*).

As to tacit
revoca-
tion.

It seems impossible to find any reason in principle why the necessity for communication should be less in the case of a revocation which is made not by words but by conduct, as by disposing to some one else of a thing offered for sale. Nor does it seem practicable in the face of the decisions just cited, though they do not actually cover such a case, to say that any such difference is recognized by the law of England. The authority most in point, *Dickinson v. Dodds* (*r*), is not of itself decisive. The facts were these. A. offered in writing to sell certain houses to B., adding a statement that the offer was to be "left over" until a time named; which statement, as we have already seen, could have no legal effect unless to warn B. that an acceptance would not be received at any later time. B. made up his mind the next morning to accept, but delayed communicating his acceptance to A. In the course of the day he heard from a person who was acting as his agent in the matter that A. had meanwhile offered or agreed to sell the property to C. Early on the following day (and within the time limited by A.'s memorandum) B. sought out A. and handed a formal acceptance to him; but A. answered, "You are too late. I have sold the property." It was held in the first instance by Bacon V.C. that A. had made to B. an offer which up to the time of acceptance he had

(*q*) *Patrick v. Bowman* (1893) 149 U. S. 411, 424.

(*r*) (1876) 2 Ch. Div. 463, 45

L. J. Ch. 777. One or two immaterial details are omitted in stating the facts.

not revoked, and that consequently there was a binding contract between A. and B. But in the Court of Appeal it was said that, although no "express and actual withdrawal of the offer" had reached B., yet by his own showing B., when he tendered his acceptance to A., well knew that A. had done what was inconsistent with a continued intention of contracting with B. Knowing this, B. could not by a formal acceptance force a contract on A. (s). It does not appear that the knowledge which B. in fact had was conveyed to him or his agent by or through A., or any one intending to communicate it on A.'s behalf. Yet the Court held that knowledge in point of fact of the proposer's changed intention, however it reaches the other party, will make the proposer's conduct a sufficient revocation. But what if B. had communicated his acceptance to A. without knowing anything of A.'s dealings with C.? This question remains open, and must be considered on principle.

Suppose that A. offers to sell one hundred tons of iron to B., not designating any specific lot of iron, and that B. desires time to consider, and A. assents. Then A. meets with C., they talk of the price of iron, and C. offers A. a better price than he has asked from B., and they strike a bargain for a hundred tons. Then B. returns, and in ignorance of A.'s dealings with C. accepts A.'s offer formerly made to him. Here are manifestly two good contracts. A. is bound to deliver 100 tons of iron to B. at one price, and 100 tons to C. at another. And if A. has in fact only 100 tons, and was thinking only of those hundred tons, it makes no difference. He would be equally bound to B. and C. if he had none. He must deliver them iron of the quantity and quality contracted

Possibility
of double
accept-
ance.

(s) The headnote says: "*Seemle*, that the sale of the property to a third person would of itself amount to a withdrawal of the offer, even although the person to whom the offer was first made had no knowledge of the sale." But this seems

unwarranted by the judgments. See the remarks of James L.J. at p. 472, and of Mellish L.J. at p. 475, and per Lord Herschell, *Henthorn v. Fraser* [1892] 2 Ch. at p. 33.

for, or pay damages. How then will the case stand if, other circumstances being the same, the dealing is for specific goods, or for a house? Here it is impossible that A. should perform his agreement with both B. and C., and therefore they cannot both make him perform it; but that is no reason why he should not be answerable to both of them. The one who does not get performance may have damages. It remains to ask which of them shall have the option of claiming performance, if the contract is otherwise such that its performance can be specifically enforced. The most convenient solution would seem to be that he whose acceptance is first in point of time should have the priority: for the preference must be given to some one, and the first acceptance makes the first complete contract. There is no reason for making the contract relate back for this purpose to the date of the proposal. This is consistent with everything that was really decided in *Dickinson v. Dodds* (t). The reasons given for that decision cannot, it is submitted, be relied on.

It is right to add that *Cooke v. Oxley* (u) may be so read as to support the opinion that a tacit revocation need not be communicated at all. But the apparent inference to this effect is expressly rejected in *Stevenson v. McLean* (x). If *Cooke v. Oxley* be still authority for anything, it is not authority for that.

Limits of Acceptance or of its Revocation.

Communi-
cation of
accept-
ance.

There is a material distinction, though it is not fully recognized in the language of our authorities, between the acceptance of an offer which asks for a promise, and of an offer which asks for an act, as the condition of the offer becoming a promise. Where the acceptance is to consist of a

(t) 2 Ch. Div. 463, 45 L. J. Ch. 777. Note that the suit was for specific performance, and cp. Langdell, Summary, 245-6, and Anson, 33-35. There was also a claim for damages, but apparently nothing

was said about it.

(u) (1790) 1 R. R. 783, 3 T. R. 653.

(x) (1880) 5 Q. B. D. at p. 351, 49 L. J. Q. B. 701.

promise, it must be communicated to the proposer (*y*). But where the acceptance is to consist of an act—as despatching goods ordered by post—it seems that no further communication of the acceptance is necessary than the performance of the proposed act, or at any rate the proposer may dispense with express communication, and an intention to dispense with it may be somewhat readily inferred from the nature of the transaction (*z*).

Further, even when the acceptance consists of a promise, and therefore must be communicated, any reasonable means of communication prescribed or contemplated by the proposer are deemed sufficient as between the acceptor and himself. Means authorized by proposer.

If an acceptance by means wholly or partly beyond the sender's control, such as the public post or telegraph (*a*), is contemplated by the parties, then an acceptance so despatched is complete as against the proposer from the time of its despatch out of the sender's control; and, what is more, is effectual notwithstanding any miscarriage or delay in its transmission happening after such despatch. Post or telegraph.

The parties are presumed to contemplate acceptance by post or telegraph whenever the circumstances are such as to make such acceptance reasonable in the usual course of business (*b*).

It should seem obvious that an uncommunicated mental assent, since it is neither the communication of a promise nor an overt act of performance, cannot make a contract in any class of cases; though so lately as 1877 it was found needful to reassert this principle in the House of Lords (*c*). General rule of communication.

(*y*) *Mozley v. Tinkler* (1835) 1 C. M. & R. 692, 40 R. R. 675; *Russell v. Thornton* (1859) 4 H. & N. 788, 798, 804, 29 L. J. Ex. 9; *Hebb's case* (1867) L. R. 4 Eq. 9.

(*z*) *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256, per Lindley L.J. at pp. 262-3, Bowen L.J. at p. 269.

(*a*) As to the telegraph being on the same footing as letter post, *Cowan v. O'Connor* (1888) 20 Q. B. D. 640, 57 L. J. Q. B. 401.

(*b*) *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373.

(*c*) *Brogden v. Metropolitan Ry. Co.* (1877) 2 App. Ca. at p. 688 (Lord Selborne), at p. 691 (Lord Black-

At the same time a proposer who prescribes a particular manner of communication may preclude himself from afterwards showing that it was not in fact sufficient. In Lord Blackburn's words, "when an offer is made to another party, and in that offer there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing there is a complete contract." The most important application of this exception will come before us immediately. But it is not true "that a simple acceptance in your own mind, without any intimation to the other party, and expressed by a mere private act, such as putting a letter into a drawer," will, as a rule, serve to conclude a contract (*d*).

Difficulties as to contracts by correspondence.

We now come to the special rules which, after much uncertainty, have been settled by our Courts as to contracts entered into by correspondence between persons at a distance. Before dealing with authorities it may be useful to show the general nature of the difficulties that arise. We start with the principle that the proposer is bound from the date of acceptance. Then we have to consider what is for this purpose the date of acceptance, a question of some perplexity, and much vexed in the books. It appears just and expedient, as concerning the accepting party's rights, that the acceptance should date from the time when he has done all he can to accept, by putting his affirmative answer in a determinate course of transmission to the proposer. From that time he must be free to act on the contract as valid, and disregard any revocation that

burn), and at p. 697 (Lord Gordon). The judgments in the Court below which gave rise to these remarks are not reported.

(*d*) As to a different rule formerly supposed to have been introduced in the case of agreements to take shares under the Companies Act, 1862, see *Gunn's case* (1867) L. R. 3 Ch. 40, 37 L. J. Ch. 40. There

need not be formal notice of allotment; acting towards the applicant on the footing that he has got the shares, *e.g.* appointing him to an office under the company for which the shares are a necessary qualification, is enough. This of course is quite in accordance with general principles. *Richards v. Home Assurance Association* (1871) L. R. 6 C. P. 591, 40 L. J. C. P. 290.

reaches him afterwards. Hence the conclusion is suggested that at this point the contract is irrevocable and absolute. But are we to hold it absolute for all purposes? Shall the proposer be bound, though, without any default of his own, the acceptance never reach him? Shall the acceptor remain bound, though he should afterwards despatch a revocation which arrives with or even before the acceptance? The first question is answered by our Courts in the affirmative; the second is still open. On principle a negative answer to both would seem the more reasonable. The proposer cannot, at all events, act on the contract before the acceptance is communicated to him; as against him, therefore, a revocation should be in time if it reaches him together with or before the original acceptance, whatever the relative times of their despatch. On the other hand, it seems not reasonable that he should be bound by an acceptance that he never receives. He has no means of making sure whether or when his proposal has been received (*e*), or whether it is accepted or not, for the other party need not answer at all. The acceptor might more reasonably be left to take the more avoidable risk of his acceptance miscarrying.

In the judicial treatment of these questions, however, Theories considerations of a different kind have prevailed. It has proposed been assumed that there must be some one moment at in English cases. which the consent of the parties is to be deemed complete, and the contract absolute as against both of them and for all purposes; and further, a peculiar character has been attributed to the post-office as a medium of communication. In some of the cases it is said that the acceptance of a proposal by post completes the contract as soon as the letter is despatched, because the post-office is the common agent of both parties. This may be so as regards the

(*e*) It is possible to obtain an official acknowledgment of the due delivery of a registered letter; but

this does not prove that the contents have actually come to the knowledge of the addressee.

property in the letter, but the promise expressed by the words written on the paper is not a subject of bailment. But the reason has been put in a different way; namely, that a man who requests or authorizes an acceptance of his offer to be sent in a particular way must take the risks of the mode of transmission which he has authorized, and that in the common course of affairs the sending of a written offer by post amounts to an authority to send the answer in the same manner; and still more lately (*f*) it has been put on the broader ground that persons who are not in immediate neighbourhood contemplate the post-office as the ordinary and reasonable means of communication. But if the proposer of a contract by letter does not really choose the post as a means of communication any more than the acceptor, it is not easy to see why the risk of miscarriage should be thrown on him by preference.

Revoca-
tion arriv-
ing before
accept-
ance.

Much of the language that has been used suggests, though it only suggests, the consequence that even a revocation despatched after the acceptance and arriving before it would be inoperative. If the contract is absolutely bound by posting a letter of acceptance, a telegram revoking it would be too late; and this even if the letter never arrived at all, so that the revocation were the only notice received by the proposer that there ever had been an acceptance.

This is a startling consequence at first sight, but the hardship is less than it seems, for a party wishing to reserve his freedom of action as long as possible will still have two ways of doing so: he may make his acceptance in writing expressly subject to revocation by telegraph, or he may abstain from answering by letter at all, and only telegraph his final decision. English Courts may now be bound to hold that an unqualified acceptance, once posted, cannot be revoked even by a telegram or special messenger outstripping its arrival.

(*f*) *Henthorn v. Fraser* [1892] 2 Ch. 27, 61 L. J. Ch. 373.

Turning to the authorities, we need not dwell much on the earlier cases, of which an account is given in the Appendix (g). They established that an acceptance by post, despatched in due time as far as the acceptor is concerned, concludes the contract notwithstanding delay in the despatch by the proposer's fault (as if the offer is misdirected), or accidental delay in the delivery; and that the contract, as against the proposer, dates from the posting, so that he cannot revoke his offer after the acceptance is despatched. Until 1879 it was uncertain whether a letter of acceptance that miscarried altogether was binding on the proposer. In that year the point came before the Court of Appeal (h). An application for shares in the plaintiff company, whose office was in London, was handed by the defendant to a country agent for the company. A letter of allotment, duly addressed to the defendant, was posted from the London office, but never reached him. The company went into liquidation, and the liquidator sued for the amount due on the shares. It was held by Thesiger and Baggallay L.JJ. that "if an offer is made by letter, which expressly or impliedly authorizes the sending of an acceptance of such offer by post, and a letter of acceptance is posted in due time, a complete contract is made at the time when the letter of acceptance is posted, though there may be delay in its delivery" (i); that, on the grounds and reasoning of the authorities, this extends to the case of a letter wholly failing to reach its address; that in the case in hand the defendant must under the circumstances be taken to have authorized the sending by post of a letter of allotment; and that in the result he was bound. They were disposed to limit the rule "to cases in

Earlier cases on contracts by correspondence.

(g) See Note B. For recent Continental opinions see Prof. J. Kohler, *Vertrag unter Abwesenden*, in *Archiv für bürgerl. Recht*, March, 1889; Valéry, *Des Contrats par Correspondance*, Paris, 1895.

(h) *Household Fire Insurance Co. v. Grant* (1879) 4 Ex. Div. 216, 48 L. J. Ex. 577, Finch Sel. Ca. 133.

(i) *Baggallay* L.J. 4 Ex. Div. at p. 224.

which, by reason of general usage, or of the relations between the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized" (*k*). Cases outside these limits, however, are not likely to be frequent; and now, in *Henthorn v. Fraser* (*l*), it is decided that an offer delivered by hand may authorize, or, in the terms preferred by the Court, contemplate, an acceptance by post (*m*). In *Grant's case* Bramwell L.J. delivered a vigorous dissenting judgment, in which he pointed out among other things the absurdity of treating a revocation which overtakes the acceptance as ineffectual, but relied mainly on the broad ground that a letter not delivered at all is not a communication (*n*). In *Henthorn v. Fraser* Kay L.J. did not conceal his dissatisfaction with the reasoning of the authorities by which the Court was bound. It may perhaps not be too presumptuous, but it seems useless, to regret that these views could not prevail. It will be seen by reference to the Appendix that the decisions of the Court of Appeal confirm that sense in which a previous decision of the House of Lords was generally understood. The practical conclusion seems to be that every prudent man who makes an offer of any importance by letter should expressly make it conditional on his actual receipt of an acceptance within some definite time. It would be impossible to contend that a man so doing could be bound by an acceptance which either wholly miscarried or arrived later than the specified time (*o*).

(*k*) Baggallay L.J. 4 Ex. Div. at p. 228; the same limitation seems admitted by Thesiger L.J. at p. 218.

(*l*) [1892] 2 Ch. 27, 61 L. J. Ch. 373.

(*m*) Delivery to a postman who is not authorized to receive letters for the post is not equivalent to posting: *Re London and Northern Bank* [1900] 1 Ch. 220, 69 L. J. Ch. 24.

(*n*) 4 Ex. Div. at p. 234.

(*o*) See per Thesiger L.J. 4 Ex. Div. at p. 223, and per Bramwell L.J. at p. 238. Held acc. in Massachusetts (where, however, the general doctrine that an acceptance by post concludes the contract from the date of posting is not received); *Lewis v. Browning* (1880) 130 Mass. 173.

We have seen that in general the contract dates from the acceptance; and though the acceptance be in form an acknowledgment of an existing agreement, yet this will not make the contract relate back to the date of the proposal, at all events not so as to affect the rights of third persons (*p*).

Acceptance will not relate back though retrospective in form.

There is believed to be one positive exception in our law to the rule that the revocation of a proposal takes effect only when it is communicated to the other party. This exception is in the case of the proposer dying before the proposal is accepted. This event is in itself a revocation, as it makes the proposed agreement impossible by removing one of the persons whose consent would make it (*q*). There is no distinct authority to show whether notice to the other party is material or not; but in the analogous case of agency the death of the principal in our law, though not in Roman law, puts an end *ipso facto* to the agent's authority, without regard to the time when it becomes known either to the agent or to third parties (*r*). It would probably be impossible not to follow the analogy of this doctrine. The Indian Contract Act makes the knowledge of the other party before acceptance a condition of the proposal being revoked by the proposer's death. As for insanity, which is treated in the same way by the Indian Act, that would not in general operate as a revocation by the law of England, for we shall see that the contract of a lunatic (not so found by inquisition) is only voidable even if his state of mind is known to the other party. But it has been said that "if a man becomes so far

Death of proposer: *semble*, an absolute revocation though not known to other party.

Insanity no revocation.

(*p*) *Felthouse v. Bindley* (1862) 11 C. B. N. S. 869, 31 L. J. C. P. 204.

(*q*) Per Mellish L.J. in *Dickinson v. Dodds* (1876) 2 Ch. Div. at p. 475, 45 L. J. Ch. 777.

(*r*) *Blades v. Free* (1829) 9 B. &

C. 167, 32 R. R. 620; *Campanari v. Woodburn* (1854) 15 C. B. 400, 24 L. J. C. P. 13, 2 Kent Comm. 646, D. 46, 3, de solut. et liberat. 32. The Indian Contract Act, s. 208, illust. (*c*), adopts the Roman rule.

insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting" (s).

Certainty of Acceptance.

The next rule is in principle an exceedingly simple one. It is that

Accept-
ance must
be un-
qualified.

"In order to convert a proposal into a promise the acceptance must be absolute and unqualified" (t).

For unless and until there is such an acceptance on the one part of terms proposed on the other part, there is no expression of one and the same common intention of the parties, but at most expressions of the more or less different intentions of each party separately—in other words, proposals and counter-proposals. Simple and obvious as the rule is in itself, the application to a given set of facts is not always obvious, inasmuch as contracting parties often use loose and inexact language, even when their communications are in writing and on important matters. It will be seen that the question whether the language used on a particular occasion does or does not amount to an acceptance is wholly a question of construction, and generally though not necessarily the construction of a written instrument. The cases in which such questions have been decided are numerous (u), and we shall here give by way of illustration only a selection of modern ones (x).

Instances
of insuffi-
cient ac-
ceptance.

In *Honeyman v. Marryat* (y), before the House of Lords, a proposal for a sale was accepted "subject to the terms of a contract being arranged" between the vendor's and purchaser's solicitors: this was clearly no

(s) Bramwell L.J. *Drew v. Nunn* (1879) 4 Q. B. Div. at p. 669, 48 L. J. Q. B. 591.

(t) Indian Contract Act, s. 7, sub-s. 1.

(u) For collected authorities, see (*inter alia*) Fry on Specific Performance, c. 2.

(x) Cp. also the French case in the Court of Cassation given in Langdell's Select Cases on Contract, 155.

(y) (1857) 6 H. L. C. 112, 26 L. J. Ch. 619, by Lord Wensleydale. The case was not argued, no one appearing for the appellant.

contract. Compare with this *Hussey v. Horne-Payne* (z), from which it seems that an acceptance of an offer to sell land "subject to the title being approved by our solicitors" is not a qualified or conditional acceptance, but means only that the title must be investigated in the usual way; in other words, it expresses the conditions annexed by law to contracts of this class, that a good title shall be shown by the vendor.

In *Appleby v. Johnson* (a), the plaintiff wrote to the defendant, a calico-printer, and offered his services as salesman on certain terms, among which was this: "a list of the merchants to be regularly called on by me to be made." The defendant wrote in answer: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; but I think we are quite agreed on all. We shall therefore expect you on Monday. (Signed)—J. Appleby.—P.S.—I have made a list of customers which we can consider together." It was held that on the whole, and especially having regard to the postscript, which left an important term open to discussion, there was no complete contract.

In *Crossley v. Maycock* (b), an offer to buy certain land was accepted, but with reference to special conditions of sale not before known to the intending purchaser. Held only a conditional acceptance.

In *Lloyd v. Nowell* (c), an agreement "subject to the preparation by my solicitor and completion of a formal contract" was held (1) to exclude the formation of a binding agreement; (2) not to be a condition which the vendor could waive as being only for his benefit. But in *North v. Percival* (d), the words "heads of agreement . . . subject to approval of conditions and form of agreement by purchaser's solicitor" were held by Kekewich J. consistent with a complete contract.

In *Filby v. Hounsell* [1896] 2 Ch. 737, 65 L. J. Ch. 852, an acceptance by a purchaser "subject to contract as agreed," i.e. a form set out on the vendor's own conditions of sale, was held without difficulty to be absolute.

In *Stanley v. Dowdeswell* (e), an answer in this form: "I have decided on taking No. 22, Belgrave Road, and have spoken to my agent, Mr. C., who will arrange matters with you," was held insufficient to make a contract, as not being complete and unqualified, assuming (which was doubtful) that the letter of which it was part did otherwise sufficiently refer to the terms of the proposal.

(z) (1879) 4 App. Ca. 311, 322, 48 L. J. Ch. 846.

(a) (1874) L. R. 9 C. P. 158, 43 L. J. C. P. 146.

(b) (1874) L. R. 18 Eq. 180, 43 L. J. Ch. 379, followed in *Jones v. Daniel* [1894] 2 Ch. 332, 63 L. J. Ch. 562.

(c) [1895] 2 Ch. 744, 64 L. J. Ch. 744.

(d) [1898] 2 Ch. 128, 67 L. J. Ch. 321.

(e) (1874) L. R. 10 C. P. 102. Compare *Smith v. Webster* (1876) 3 Ch. Div. 49, 45 L. J. Ch. 528.

AGREEMENT, PROPOSAL, AND ACCEPTANCE.

In *Addinell's case* (*f*) and *Jackson v. Turquand* (*g*), a bank issued a circular offering new shares to existing shareholders in proportion to their interests, and also asking them to say if in the event of any shares remaining they should wish to have any more. Certain shareholders wrote in answer, accepting their proportion of shares, and also desiring to have a certain number of additional shares, if they could, on the terms stated in the circular. In reply to this the directors sent them notices that the additional shares had been allotted to them, and the amount must be paid to the bank by a day named, or the shares would be forfeited. It was held by Kindersley V.-C. and confirmed by the House of Lords, that as to the first or proportional set of shares the shareholder's letter was an acceptance constituting a contract, but as to the extra shares it was only a proposal; and that as the directors' answers introduced a material new term (as to forfeiture of the shares if not paid for within a certain time), there was no binding contract as to these.

In *Wyne's case* (*h*) two companies agreed to amalgamate. The agreement was engrossed in two parts, and contained a covenant by the purchasing company to pay the debts of the other. But the purchasing company (which was unlimited) before executing its own part inserted a proviso limiting the liability of its members under this covenant to the amount unpaid on their shares. This being a material new term, the variance between the two parts as executed made the agreement void. In this, and later in *Beck's case* (*i*), in the same winding-up, a shareholder in the absorbed company applied for shares in the purchasing company credited with a certain sum according to the agreement, and received in answer a letter allotting him shares to be credited with a "proportionate amount of the net assets" of his former company. It was held that, apart from the question whether the allotment was conditional on the amalgamation being valid, there was no contract to take the shares.

A. telegraphs to B.: "Will you sell us Whiteacre? Telegraph lowest cash price, answer paid." B. telegraphs in reply: "Lowest price for Whiteacre, 900*l*." This has been held not to amount to an offer to sell, so that a telegram from A. purporting to agree to the purchase at 900*l*. is itself only an offer (*k*).

Where a seller undertook to accept the highest net money tender made by either of two competitors for the purchase, and one of them offered such sum as would exceed by 200*l*. the sum (unknown) which might be offered by the other: this was held no acceptance of the seller's terms, and incapable of constituting a contract (*l*).

Instances
of suffi-

On the other hand, the following instances will show that the rule

- (*f*) (1865) L. R. 1 Eq. 225.
- (*g*) (1869) L. R. 4 H. L. 305, 39 L. J. Ch. 11.
- (*h*) (1873) L. R. 8 Ch. 1002.
- (*i*) (1874) L. R. 9 Ch. 392, 43 L. J. Ch. 531.

- (*k*) *Harvey v. Facey* (J. C.) [1893] A. C. 552, 62 L. J. P. C. 127.

- (*l*) *South Hetton Coal Co. v. Haswell, &c. Coal Co.* [1898] 1 Ch. 465, 67 L. J. Ch. 238, C. A.

must be cautiously applied. An acceptance may be complete though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of *dissent*, so that the whole thing may be described as a "grumbling assent" (*m*).

Again, an acceptance is of course not made conditional by adding words that in truth make no difference; as where the addition is simply immaterial (*n*), or a mere formal memorandum is enclosed for signature, but not shown to contain any new term (*o*). And further, if the person answering an unambiguous proposal accepts it with the addition of ambiguous words, which are capable of being construed consistently with the rest of the document and so as to leave the acceptance absolute, they will if possible be so construed (*p*).

Again, the unconditional acceptance of a proposal is not deprived of its effect by the existence of a misunderstanding between the parties in the construction of collateral terms which are not part of the agreement itself (*q*).

An acceptance on condition is absolute if expressed in a manner which estops the acceptor from denying that the condition has been performed, or that he has waived its performance (*r*).

One further caution is needed. All rules about the formation and interpretation of contracts are subject to the implied proviso, "unless a contrary intention of the parties appears." And it may happen that though the parties are in fact agreed upon the terms—in other words, though there has been a proposal sufficiently accepted to satisfy the general rule—yet they do not mean the agreement to be binding in law till it is put into writing or into a formal writing. If such be the understanding between them, they are not to be sooner bound against both their wills. "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agree-

Parties may postpone conclusion of contract, though agreed on the terms, till embodied in more formal instrument.

(*m*) *Joyce v. Swann* (1864) 17 C. B. N. S. 84; cp. per Lord St. Leonards, 6 H. L. C. 277-8 (in a dissenting judgment).

(*n*) *Clive v. Beaumont* (1847) 1 De G. & S. 397.

(*o*) *Gibbins v. N. E. Metrop. Asylum District* (1847) 11 Beav. 1.

(*p*) *English and Foreign Credit Co. v. Arduin* (1870-1) L. R. 5 H. L.

64, per Lord Westbury, at p. 79, 40 L. J. Ex. 108.

(*q*) *Baines v. Woodfall* (1859) 6 C. B. N. S. 657, 28 L. J. C. P. 338. The facts unfortunately do not admit of abridgment.

(*r*) *Roberts v. Security Co.* [1897] 1 Q. B. 111, 66 L. J. Q. B. 119, C. A.

ment independent of that stipulation" (s). Whether such is in truth the understanding is a question which depends on the circumstances of each particular case; if the evidence of an agreement consists of written documents, it is a question of construction (not subject to any fixed rule or presumption) whether the expressed agreement is final (t). For this purpose the whole of a continuous correspondence must be looked at, although part of it, standing alone, might appear to constitute a complete contract (u).

It is not to be supposed, "because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement" (x). Still more is this the case if the first record of the terms agreed upon is in so many words expressed to be "subject to the preparation and approval of a formal contract" (y): or where a certain act, such as payment of the first premium of insurance, is expressly mentioned to fix the commencement of the contract (z). But again: "it is settled law that a contract may be made by letters, and that the mere reference in them to a future formal contract will not prevent their constituting a binding bargain" (a). And in *Brogden v. Metropolitan Ry. Co.* (b), it was held by the House of Lords that the conduct of the parties, who in fact

(s) *Chinmook v. Marchioness of Ely* (1865) 4 D. J. S. 638, 646.

(t) *Rossiter v. Miller* (1878) 3 App. Ca. 1124, 1152, 48 L. J. Ch. 10.

(u) *Hussey v. Horne-Payne* (1879) 4 App. Ca. 311, 48 L. J. Ch. 846.

(x) *Ridgway v. Wharton* (1856-7) 6 H. L. C. 238, 264, 268, per Lord Cranworth C., and see per Lord Wensleydale at pp. 305-6, 27 L. J. Ch. 46.

(y) *Winn v. Bull* (1877) 7 Ch. D. 29.

(z) *Canning v. Farquhar* (1886) 16 Q. B. Div. 727, 55 L. J. Q. B. 225.

(a) James L.J. in *Bonneville v. Jenkins* (1878) 8 Ch. Div. 70, 73, 47 L. J. Ch. 758; *Bolton v. Lambert* (1889) 41 Ch. Div. 295, 305.

(b) (1877) 2 App. Ca. 666: see Lord Cairns' opinion.

dealt for some time on the terms of a draft agreement which had never been formally executed, was inexplicable on any other supposition than that of an actual though informal consent to a contract upon those terms.

The tendency of recent authorities is to discourage all attempts to lay down any fixed rule or canon as governing these cases. The question may however be made clearer by putting it in this way—whether there is in the particular case a final consent of the parties such that no new term or variation can be introduced in the formal document to be prepared (c).

Certainty of Terms.

An agreement is not a contract unless its terms are certain or capable of being made certain.

Agreement must be certain.

For the Court cannot enforce an agreement without knowing what the agreement is. Such knowledge can be derived only from the manner in which the parties have expressed their intention. It is their business to find such expressions as will convey their meaning with reasonable certainty to a reasonable man conversant with affairs of the kind in which the contract is made. The question then is whether such certainty be present in the particular case. One or two instances will serve as well as many. A promise by the buyer of a horse that if the horse is lucky to him, he will give 5*l.* more, or the buying of another horse, is “much too loose and vague to be considered in a court of law.” “The buying of another horse” is a term to which the Court cannot assign any definite meaning (d). An agreement to sell an estate, reserving “the necessary land for making a railway,” is too vague (e). An agreement to take a house “if put into

(c) Lord Blackburn, 3 App. Ca. at p. 1151. In addition to cases already cited see *Lewis v. Brass* (1877) 3 Q. B. Div. 667.

(d) *Guthing v. Lynn* (1831) 2 B. & Ad. 232.

(e) *Pearce v. Watts* (1875) L. R. 20 Eq. 492, 44 L. J. Ch. 492.

thorough repair," and if the drawing-rooms were "handsomely decorated according to the present style," has been dismissed as too uncertain to be specifically enforced (*f*). A statement by a parent to his daughter's future husband that she will have "a share" of his property cannot be construed as a promise of an equal share (*g*). On the other hand an agreement to execute a deed of separation containing "usual covenants" is not too vague to be enforced (*h*).

Illusory
promises.

To this head those cases are perhaps best referred in which the promise is illusory, being dependent on a condition which in fact reserves an unlimited option to the promisor. "Nulla promissio potest consistere, quae ex voluntate promittentis statum capit" (*i*). Thus where a committee had resolved that for certain services "such remuneration be made as shall be deemed right," this gave no right of action to the person who had performed the services; for the committee alone were to judge whether any or what recompense was right (*k*). Moreover a promise of this kind, though it creates no enforceable contract, is so far effectual as to exclude the promisee from falling back on any contract to pay a reasonable remuneration which would be inferred from the transaction if there were no express agreement at all. In *Roberts v. Smith* (*l*) there was an agreement between A. and B. that B. should perform certain services, and that in one event A. should pay B. a certain salary, but that in another event A. should pay B. whatever A. might think reasonable. That other event having happened, the Court held there was no contract which B. could enforce. Services

(*f*) *Taylor v. Portington* (1855) 7 D. M. & G. 328. This of course did not decide that an action for damages would not lie.

(*g*) *Re Fickus* [1900] 1 Ch. 331, 69 L. J. Ch. 161.

(*h*) *Hart v. Hart* (1881) 18 Ch. D.

670, 684, 50 L. J. Ch. 697.

(*i*) D. 45, l. de verb. obl. 108, § 1.

(*k*) *Taylor v. Brewer* (1813) 1 M. & S. 290, 21 R. R. 831.

(*l*) (1859) 4 H. & N. 315, 28 L. J. Ex. 164.

had indeed been rendered, and of the sort for which people usually are paid and expect to be paid; so that in the absence of express agreement there would have been a good cause of action for reasonable reward. But here B. had expressly assented to take whatever A. should think reasonable (which might be nothing), and had thus precluded himself from claiming to have whatever a jury should think reasonable. It would not be safe, however, to infer from this case that under no circumstances whatever can a promise to give what the promisor shall think reasonable amount to a promise to give a reasonable reward, or at all events something which can be found as a fact not to be illusory. The circumstances of each case (or in a written instrument the context) must be looked to for the real meaning of the parties; and "I leave it to you" may well mean in particular circumstances (as in various small matters it notoriously does), "I expect what is reasonable and usual, and I leave it to you to find out what that is," or, "I expect what is reasonable, and am content to take your estimate (assuming that it will be made in good faith and not illusory) as that of a reasonable man" (m).

Another somewhat curious case of an illusory promise (though mixed up to some extent with other doctrines) is *Moorhouse v. Colvin* (n). There a testator, having made a will by which he left a considerable legacy to his daughter, wrote a letter in which he said, after mentioning her other expectations, "this is not all: she is and shall be noticed in my will, but to what further amount I cannot precisely say." The legacy was afterwards revoked. It was contended on behalf of the daughter's husband,

(m) Such a case (if it can be supported, see the remarks on it in *Roberts v. Smith*) was *Bryant v. Flight* (1839) 5 M. & W. 114, where the majority of the Court held that it was for the jury to

ascertain how much the defendant, acting *bona fide*, would or ought to have awarded.

(n) (1851) 15 Beav. 341, 348, affd. by L.JJ. *ib.* 350, n.

to whom the letter had with the testator's authority been communicated before the marriage, that there was a contract binding the testator's estate to the extent of the legacy given by the will as it stood at the date of the letter. But it was held that the testator's language expressed nothing more than a vague intention, although it would have been binding had it referred to the specific sum then standing in the will, so as to fix that sum as a minimum to be expected at all events.

Promise
to make
contract
with third
person.

A promise to enter into a certain kind of agreement with a third person is obviously dependent for its performance on the will of that person, but is not thereby rendered so uncertain as not to afford a cause of action as between the parties to it. The consent of a third person is not more uncertain than many other things which parties may and do take on themselves to warrant (*o*).

Acceptance by Conduct.

Tacit ac-
ceptance
of contract
must be
unambi-
guous.

Cases of
special
conditions
on tickets.

Conduct which is relied on as constituting the acceptance of a contract must (no less than words relied on for the same purpose) be unambiguous and unconditional (*p*).

Where the proposal itself is not express, then it must also be shown that the conduct relied on as conveying the proposal was such as to amount to a communication to the other party of the proposer's intention. Difficult questions may arise on this point, and in particular have arisen in cases where public companies entering into contracts for the carriage or custody of goods have sought to limit their liability by special conditions printed on a ticket delivered to the passenger or depositor at the time of making the contract. The tendency of the earlier cases on the subject is to hold that (apart from the statutory restrictions of the Railway and Canal Traffic Act,

(*o*) *Foster v. Wheeler* (1888) 38
Ch. Div. 130, 57 L. J. Ch. 149, 871.

(*p*) *Warner v. Willington* (1856) 3
Drew. 523, 533, 25 L. J. Ch. 662.

1854, which do not apply to contracts with steamship companies, nor to contracts with railway companies for the mere custody as distinguished from the carriage of goods) such conditions are binding. A strong opposite tendency is shown in *Henderson v. Stevenson* (q), where the House of Lords decided that in the case of a passenger travelling by sea with his luggage an indorsement on his ticket stating that the shipowners will not be liable for loss does not prevent him from recovering for loss caused by their negligence, unless it appears either that he knew and assented to the special terms, or at any rate that he knew there were some special terms and was content to accept them without examination (r). Since this there have been reported cases arising out of the deposit of goods, for safe custody or otherwise, in exchange for a ticket on which were endorsed conditions limiting the amount of the receiver's liability (s). The result, as it stands at present, appears to be that it is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to contract only on special terms. A person who, knowing this (t), enters

(q) (1875) L. R. 2 Sc. & D. 470. Lord Chelmsford's and Lord Hatherley's *dicta* (pp. 477, 479) go farther, and suggest that the contract is complete before the ticket is delivered at all, so that some other communication of the special terms would have to be shown. But the later cases have not adopted this view.

(r) Followed in *Richardson & Co. v. Rowntree* [1894] A. C. 217, 63 L. J. Q. B. 283.

(s) *Harris v. G. W. R. Co.* (1876) 1 Q. B. D. 515, 45 L. J. Q. B. 729; *Parker v. S. E. R. Co.* (1876); *Gabell v. S. E. R. Co.* (1877) 2 C. P. Div. 416, 46 L. J. C. P. 768, reversing in *Parker's case* the judgment of the C. P. Div. 1 C. P. D. 618, 46 L. J. C. P. 768; *Watkins v. Rymill* (1883)

10 Q. B. D. 178, 52 L. J. Q. B. 121, where the former cases are fully reviewed by Stephen J. Compare *Burke v. S. E. R. Co.* (1879) 5 C. P. D. 1, 49 L. J. C. P. 107.

(t) Knowledge that there are special conditions must be found as a fact. It may be inferred from reasonable means of knowledge; in deciding whether the means offered are reasonable all the circumstances, such as the class of persons to whom the notice is addressed, are properly taken into account: *Richardson & Co. v. Rowntree* [1894] A. C. 217, 63 L. J. Q. B. 283. Compare Ulpian's remarks on a fairly analogous case, D. 14, 3, de inst. act. 11, § 2, 3. De quo palam

into the contract, is then deemed to assent to the special terms; but this, again, is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt.

As to
promises
expressed
in deeds.

It has already been pointed out that the ordinary rules of proposal and acceptance do not apply to promises embodied in a deed. It is established by a series of authorities which appear to be confirmed by the *ratio decidendi* of *Xenos v. Wickham* (u), in the House of Lords, that a promise so made is at once operative without any question of acceptance; and this because it derives its force not from anything passing between the parties, but from the promisor's—or, in the regular language of conveyancing, covenantor's—solemn admission that he is bound. Thus an obligation is created which whenever it comes to the other party's knowledge affords a cause of action without any other signification of his assent, and in the meanwhile is irrevocable. But if the promisee refuses his assent when the promise comes to his knowledge the contract is avoided.

proscriptum fuerit, ne cum eo contrahatur, is praepositi loco non habetur. . . . Proscribere palam sic accipimus: claris litteris, unde de plano recte legi possit, ante tabernam scilicet, vel ante eum locum, in quo negotiatio exercetur, non in loco remoto, sed in evidenti. . . . Certe si quis dicat ignorasse se litteras, vel non observasse quod propositum erat, cum multilegerent, cumque palam esset propositum, non audietur. Before the recent cases on the subject the conditions printed by railway companies on their tickets, and the corresponding notices exhibited by them, were not often, they are still not always, “claris litteris, unde de plano recte legi possit,” or “in loco evidenti.” As to conditions on passenger tickets see per Wills and Wright JJ. in *G. N. R. Co. v. Palmer* [1895] 1 Q. B. 862, 64 L. J. Q. B. 316,

where the point whether there was sufficient notice of the condition was not open.

(u) (1866) L. R. 2 H. L. 296. The previous cases were *Doe d. Garmons v. Knight* (1826) 5 B. & C. 671, 29 R. R. 355 (a mortgage); *Exton v. Scott* (1833) 6 Sim. 31, 38 R. R. 72 (the like); *Hall v. Palmer* (1844) 13 L. J. Ch. 352 (bond to secure annuity after obligor's death); *Fletcher v. Fletcher* (1845) 14 L. J. Ch. 66 (covenant for settlement to be made by executors). *Xenos v. Wickham* might have been decided on the ground that the company's execution of the policy was the acceptance of the plaintiffs' proposal, and the plaintiffs' broker was their agent to receive communication of the acceptance. But that ground is distinctly not relied upon in the opinions of the Lords: see L. R. 2 H. L. at pp. 320, 323.

“If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., then B. may refuse it *in pais*” (*i.e.* without formality) “and thereby the obligation will lose its force” (*x*).

(*x*) *Butler and Baker's case*, 3 Co. Rep. 26, quoted by Blackburn J. L. R. 2 H. L. at p. 312. “Obligation” here, as always in our

older books, means the special form of deed otherwise, and now exclusively, called a bond.

CHAPTER II.

CAPACITY OF PARTIES.

Variations
in personal
capacity.

ALL statements about legal capacities and duties are taken, unless the contrary be expressed, to be made with reference to "lawful men," citizens, that is, who are not in any manner unqualified or disqualified for the full exercise of a citizen's normal rights. There are several ways in which persons may be or become incapable, wholly or partially, of doing acts in the law, and among other things of becoming parties to a binding contract. All persons must attain a certain age before they are admitted to full freedom of action and disposition of their property. This is but a necessary recognition of the actual conditions of man's life. The age of majority, however, has to be fixed at some point of time by positive law. By English law it is fixed at twenty-one years; and every one under that age is called an infant (Co. Litt. 171 *b*).

Disabili-
ties of
natural
persons:
Infancy.

Coverture.

Every woman who marries has to sustain, as incident to her new status, technically called coverture, a loss of legal capacity in various respects; a loss expressed, and once supposed to be sufficiently explained, by the fiction that husband and wife are one person.

Insanity,
&c.

Both men and women may lose their legal capacity, permanently or for a time, by an actual loss of reason. This we call insanity when it is the result of established mental disease, intoxication when it is the transient effect of drink or narcotics. Similar consequences, again, may be attached by provisions of positive law to conviction for

criminal offences. Deprivation of civil rights also may be, and has been in England in some particular cases, a substantive penalty; but it is not thus used in any part of our law now in practical operation.

On the other hand, the capacity of the "lawful man" receives a vast extension in its application, while it remains unaltered in kind, by the institution of agency. One man may empower another to perform acts in the law for him and acquire rights and duties on his behalf. By agency the individual's legal personality is multiplied in space, as by succession it is continued in time. The thing is now so familiar that it is not easy to realize its importance, or the magnitude of the step taken by legal theory and practice in its full recognition. We may be helped to this if we remember that in the Roman system there is no law of agency as we understand it. The slave, who did much of what is now done by free servants and agents, was regarded as a mere instrument of acquisition for his owner, except in the special classes of cases in which either slaves or freemen might be in a position analogous, but not fully equivalent, to that of a modern agent. As between the principal and his agent, agency is a special kind of contract. But it differs from other kinds of contract in that its legal consequences are not exhausted by performance. Its object is not merely the doing of specified things, but the creation of new and active legal relations between the principal and third persons. Hence it may fitly have its place among the conditions of contract in general, though the mutual duties of principal and agent belong rather to the treatment of agency as a species of contract.

Extension
of natural
capacity :
agency.

While the individual citizen's powers are thus extended by agency, a great increase of legal scope and safety is given to the conjoint action of many by their association in a corporate body or artificial person. The development of corporate action presupposes a developed law of agency,

Artificial
persons.

since a corporation can execute its intentions only through natural persons generally or specially authorized to act on its behalf. And as a corporation, in virtue of its perpetual succession and freedom from all or most of the disabilities which may in fact or in law affect natural persons, has powers exceeding those of a natural person, so those powers have to be defined and limited by sundry rules of law, partly for the protection of the individual members of the corporation, partly in the interest of the public.

We proceed to deal with these topics in the order indicated: and first of the exceptions to the capacity of natural persons to bind themselves by contract.

PART I.

I. INFANTS.

Infants—
General
statement
of the law.

An infant is not absolutely incapable of binding himself, but is, generally speaking, incapable of absolutely binding himself by contract (*a*). His acts and contracts are voidable at his option, subject to certain statutory and other exceptions.

By the common law a contract made by an infant is generally voidable at the infant's option, such option to be exercised either before (*b*) his attaining his majority or within a reasonable time afterwards.

Where the obligation is incident to an interest (or at all events to a beneficial interest) in property, it cannot be avoided while that interest is retained.

Some agreements are, exceptionally, not voidable but void.

By the Infants' Relief Act, 1874, loans of money to infants, contracts for the sale to them of goods other than necessaries, and accounts stated with them are absolutely

(*a*) Stated in this form by Hayes
J. 14 Ir. C. L. Rep. at p. 356.

(*b*) As to this see p. 61, below.

void; and no action can be brought on a ratification of *any* contract made during infancy.

(When the agreement of an infant is such that it cannot be for his benefit, it has been said to be absolutely void at common law; but this distinction is believed to be exploded by modern authorities.)

On the other hand an infant is bound to pay a reasonable price for necessities sold and delivered to him; where "necessaries" mean goods suitable to his condition in life and his actual requirements at the time (*c*).

An infant's express contract may be valid if it appears to the Court to be beneficial to the infant.

In certain other cases infants are enabled to make binding contracts by custom or statute.

An infant is not liable for a wrong arising out of or immediately connected with his contract, such as a fraudulent representation at the time of making the contract that he is of full age. But an infant who has represented himself as of full age is bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it.

1. *Of the contracts of infants in general at common law, and as affected by the Act of 1874.*

It was once commonly said that an agreement made by an infant, if such that it cannot be for his benefit, is not merely voidable, but absolutely void; though in general his contracts are only voidable at his option (*d*).

Of infants' contracts in general: and as to supposed distinction that some are wholly void.

(*c*) Sale of Goods Act, 1893, s. 2. This confirms the opinion that an infant's obligation to pay for necessities is not created by agreement but imposed by law; in other words, that there is not a true contract but a quasi-contract.

(*d*) An infant's deed is generally voidable, Litt. s. 259, but it is said that if it is not such as to take effect "by the delivery of his own hand," it is void, Perk. 12, Shepp. Touch. 232-3, Co. Litt. 51 *b*, *n.*, 3 Burr. 1805, 2 Dr. & W. 340. It is

But this distinction is in itself unreasonable, and is really unsupported by authority, while there is considerable authority against it. The use of the word *void* proves nothing, for it is to be found in cases where there has never been any doubt that the contract is only voidable. And as applied to other subject matters it has been held to mean only *voidable* in formal instruments (*e*) and even in Acts of Parliament (*f*).

The distinction unsupported by authority.

Actual decision is the only safe guide; and as early as 1813 it was clearly laid down in the Exchequer Chamber, as the general rule of law, that the contract of an infant may be avoided or not at his own option. The Court refused to recognize any variation of the rule as generally applicable to trading contracts (*g*).

There is nothing to set against this in any reported case of co-ordinate authority. Dicta in cases of inferior authority to the effect that trade contracts of infants are void (as distinct from voidable) could not prevail against a decision of the Exchequer Chamber even if they were necessary to the judgments in which they occur. Examination shows that they were superfluous in every case cited for the formerly current doctrine; but it seems needless to repeat what was said in earlier editions, as that doctrine is now, I believe, abandoned everywhere.

Contract of service.

In a modern case, indeed, the following opinion was given by the Court of Queen's Bench on the conviction of

assumed in modern practice that an infant's sale or gift of personal chattels with actual delivery is good: *Taylor v. Johnston* (1880) 19 Ch. D. 603, 608. According to the old books it would seem to be voidable.

(*e*) *Lincoln College's case* (1595) 3 Co. Rep. 59 *b*; *Doct. d. Bryan v. Banks* (1821) 4 B. & Ald. 401, 23 R. R. 318; *Malins v. Freeman* (1838) 4 Bing. N. C. 395, 44 R. R. 737.

(*f*) Compare *Davenport v. Reg.* (1877) (J. C. from Queensland) 3 App. Ca. at p. 128, 47 L. J. P. C. 8, with *Governors of Magdalen Hospital v. Knotts* (1879) 4 App. Ca. 324, 48 L. J. Ch. 579, in which case this latitude has at last been restrained.

(*g*) *Warwick v. Bruce*, 6 Taunt. 118, affg. s.c. 2 M. & S. 205, 14 R. R. 638.

a servant for unlawfully absenting himself from his master's employment:—

“Among many objections one appears to us clearly fatal. He was an infant at the time of entering into the agreement, which authorizes the master to stop his wages when the steam engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit (*h*); but an agreement which compels him to serve at all times during the term but leaves the master free to stop his work and his wages whenever he chooses to do so cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed” (*i*).

But this is mere laxity of language. The Court decided only that the agreement was not enforceable against the infant. It cannot have meant to say that if the master had arbitrarily refused to pay wages for the work actually done the infant could not have sued him on the agreement. Again, it is said that a lease made by an infant, without reservation of any rent (or even not reserving the best rent), is absolutely void. But this opinion was disapproved by Lord Mansfield, whose judgment Lord St. Leonards adopted as good law, though the actual decision was not on this particular point in either case (*j*). And in a modern Irish case (*k*) it was expressly decided that at all events Leases.

(*h*) It seems that *prima facie* it is so, even if it contains clauses imposing penalties, or giving a power of dismissal, in certain events: *Wood v. Fenwick* (1842) 10 M. & W. 195; *Leslie v. Fitzpatrick* (1877) 3 Q. B. D. 229, 47 L. J. M. C. 22, distinguishing *Reg. v. Lord* (next note).

(*i*) *Reg. v. Lord* (1848) 12 Q. B. 757, 17 L. J. M. C. 181, where the headnote rightly says “void against the infant.”

(*j*) *Zouch v. Parsons* (1765) 3 Burr. 1794 (where the decision was that the reconveyance of a mortgagee's infant heir, the mortgage being properly paid off, could not

be avoided by his entry before full age); *Allen v. Allen* (1842) 2 Dr. & W. 307, 340; and see Bac. Ab. 4, 361.

(*k*) *Slator v. Brady* (1863) 14 Ir. C. L. Rep. 61. The Court inclined to think that some act of notoriety by the lessor would be required, such as entering, bringing ejectment, or demanding possession (note that a freehold estate for the life of the lessor or twenty-one years had passed by the original lease); however there was another reason, namely, that the second lease might be construed as only creating a future interest to take effect on the determination of the first.

Sale, &c.,
of land.

a lease made by an infant reserving a substantial rent, whether the best rent or not, is not void but voidable; and further that it is not well avoided by the infant granting another lease of the same property to another person after attaining his full age. There is good English authority for the proposition that if a lease made by an infant is beneficial to him he cannot avoid it at all (*l*). It appears to be agreed that the sale, purchase (*m*), or exchange (*n*) of land by an infant is both as to the contract and as to the conveyance only voidable at his option.

Partnership and
share-
holding.

Again, there is no doubt that an infant may be a partner or shareholder (though in the latter case the company may refuse to accept him) (*o*); and though he cannot be made liable for partnership debts during his infancy, he is bound by the partnership accounts as between himself and his partners and cannot claim to share profits without contributing to losses. And if on coming of age he does not expressly disaffirm the partnership he is considered to affirm it, or at any rate to hold himself out as a partner, and is thereby liable for the debts of the firm contracted since his majority (*p*).

The liability of an infant shareholder who does not repudiate his shares to pay calls on them rests, as far as existing authorities go, on a somewhat different form of the same principle (of which afterwards). As to contribution in the winding up of a company, Lord Lindley (*q*) "is not aware of any case in which an infant has been put on the list of contributories. Upon principle, however,

(*l*) *Maddon v. White* (1787) 2 T. R. 159, 1 R. R. 453.

(*m*) Co. Lit. 2 *b*, Bac. Ab. Infancy, I. 3 (4, 360).

(*n*) Co. Lit. 51 *b*.

(*o*) But the company cannot dispute the validity of a transfer to an infant after the infant has trans-

ferred over to a person *sui iuris*: *Gooch's case* (1872) L. R. 8 Ch. 266, 42 L. J. Ch. 381. And see Lindley, 82-84.

(*p*) Lindley on Companies, 5th ed. 811, 828; *Goode v. Harrison* (1821) 5 B. & Ald. 147, 24 R. R. 307.

(*q*) On Companies, 809.

there does not appear to be any reason why he should not, if it be for his benefit ; and this, if there are surplus assets, might be the case.” Otherwise he cannot be deprived of his right to repudiate the shares, unless perhaps by fraud ; but in any case if he “ does not repudiate his shares, either while he is an infant or within a reasonable time after he attains twenty-one, he will be a contributory,” and still more so if after that time he does anything showing an election to keep the shares. On the whole it is clear on the authorities (notwithstanding a few expressions to the contrary), that both the transfer of shares to an infant and the obligations incident to his holding the shares are not void but only voidable (*r*).

Marriage is on a different footing from ordinary con- Marriage.
tracts (*s*), and it is hardly needful to say that the possibility of a minor contracting a valid marriage has never been doubted in our Courts. Even if either or both of the parties be under the age of consent (fourteen for the man, twelve for the woman) the marriage is not absolutely void, but remains good if when they are both of the age of consent they agree to it (*t*). But the Marriage Act, 4 Geo. 4, c. 76 (ss. 8, 22), makes it very difficult, though not impossible, for a minor to contract a valid marriage without the consent of parents or guardians (*u*).

As to promises to marry and marriage settlements, it Promises
to marry

(*r*) *Lumsden's case* (1868) L. R. 4 Ch. 31 ; *Gooch's case*, last page ; cp. p. 65, *infra*.

(*s*) Continental writers have wasted much ingenuity in debating with which class of contracts it should be reckoned. Sav. Syst. § 141 (3. 317) ; Ortolan on Inst. 2. 10.

(*t*) Bacon, Abr. 4. 336.

(*u*) In most Continental countries the earliest age of legal marriage is fixed : in France it is eighteen for

the man, fifteen for the woman, and consent of parents or lineal ancestors is required up to the ages of twenty-five and twenty-one respectively : Code Civ. 144 sqq. But this consent may be dispensed with in various ways by matter subsequent or lapse of time : see art. 182, 183, 185. The marriage law of other states (except a very few where the canon law may still prevail) appears to differ little on the average from the law of France in this particular.

and marriage settlements.

has long been familiar law that just as in the case of his other voidable contracts an infant may sue for a breach of promise of marriage, though not liable to be sued (*x*). An infant's marriage settlement is not binding on the infant unless made under the statute (see *post*, pp. 73, 75), and the Court of Chancery has no power to make it binding in the case of a ward (*y*). A settlement of a female infant's general personal property, the intended husband being of full age and a party, can indeed be enforced, but as the contract not of the wife but of the husband; the wife's personal property passing to him by the marriage, he is bound to deal with it according to his contract (*z*). And particular covenants in an infant's settlement may be valid (*a*). In any case the settlement is not void but only voidable; it may be confirmed by the subsequent conduct of the party when of full age and *sui iuris* (*b*), and can be repudiated only within a reasonable time after attaining full age (*c*). Again an infant's contract on a bill of exchange or promissory note was once supposed to be wholly void, but is now treated as only voidable (*d*). The same holds of an account stated (*e*).

Negotiable instruments. Accounts stated.

Infant cannot have specific performance.

There is one exception to the rule that an infant may enforce his voidable contracts against the other party

(*x*) Bacon, Abr. Infancy and Age, 1. 4 (4. 370). Per Lord Ellenborough, *Warwick v. Bruce* (1813) 2 M. & S. 205, 14 R. R. 634.

(*y*) *Field v. Moore* (1855) 7 D. M. G. 691, 710, 25 L. J. Ch. 66.

(*z*) Davidson, Conv. 3, pt. 2, 728.

(*a*) *Smith v. Lucas* (1881) 18 Ch. D. 531, not overruled on this point by *Edwards v. Carter* [1893] A. C. 360, 63 L. J. Ch. 100.

(*b*) *Davies v. Davies* (1870) L. R. 9 Eq. 468, 39 L. J. Ch. 343. This is not affected by the Infants' Relief Act, 1874: *Duncan v. Dixon* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437. A woman married under age is not disabled by the coverture from confirming an ante-nuptial settlement after she is of age: *Re Hodson's*

Settlement [1894] 2 Ch. 421, 63 L. J. Ch. 609.

(*c*) Without regard to the date at which any particular interest affected may fall into possession: *Edwards v. Carter* [1893] A. C. 360, 63 L. J. Ch. 100, with which *Re Jones* [1893] 2 Ch. 461, 62 L. J. Ch. 996, does not seem reconcilable. And election must be made once for all, not separate elections for each acquisition—see *Viditz v. O'Hagan* [1899] 2 Ch. pp. 569, 576.

(*d*) Undisputed in *Harris v. Wall* (1847) 1 Ex. 122, 16 L. J. Ex. 270, foll. *In re Hodson's Settlement* [1894] 2 Ch. 421, 63 L. J. Ch. 609.

(*e*) *Williams v. Moor* (1843) 11 M. & W. 256, 264, 266, 12 L. J. Ex. 253.

during his infancy, or rather there is one way in which he cannot enforce them. Specific performance is not allowed at the suit of an infant, because the remedy is not mutual, the infant not being bound (*f*).

An infant may avoid his voidable contracts (with practically few or no exceptions) either before or within a reasonable time after coming of age: the rule is that "matters *in fait* [*i.e.*, not of record] he shall avoid either within age or at full age," but matters of record only within age (Co. Lit. 380 *b*) (*g*). Subject to the general rule, established for the benefit of innocent third persons, that voidable transactions are not invalid until ratified but valid until rescinded (*h*), an infant cannot deprive himself of the right to elect at full age, and only then can his election be conclusively determined (*i*). If an infant pays a sum of money under a contract, in consideration of which the contract is wholly or partly performed by the other party, he can acquire no right to recover the money back by rescinding the contract when he comes of age. Such is the case of a premium paid for a lease (*k*), or of the price of goods (not being necessities) sold and delivered to an infant and paid for by him: and so if an infant enters into a partnership and pays a premium, he cannot either before or after his full age recover it back, nor therefore prove for it in the bankruptcy of his partners (*l*).

At what time he may avoid his contracts.

Money paid under avoided contract, when not recoverable.

(*f*) *Flight v. Bolland* (1828) 4 Russ. 298, 28 R. R. 101.

(*g*) See per Parke B. *Newry and Enniskillen Ry. Co. v. Coombe* (1849) 3 Ex. 565, 18 L. J. Ex. 325; per Cur. *L. & N. W. R. v. M^r Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97. As to an infant being bound when he comes of age by an acknowledgment made in a Court of Record, see Y. B. 20 & 21 Ed. I. p. 320.

(*h*) Per Lord Colonsay, L. R. 2 H. L. 375.

(*i*) *L. & N. W. R. v. M^r Michael*, *supra*, note (*g*); *Slator v. Trimble* (1861) 14 Ir. C. L. Rep. 342.

(*k*) *Holmes v. Blogg* (1817) 8 Taunt. 35, 508, S. C. 1 Moore, 466, 2 Moore, 552, 19 R. R. 445.

(*l*) *Ex parte Taylor* (1856) 8 D. M. G. 254, 258. But if the infant has received no consideration at all he can recover: *Hamilton v. Vaughan-Sherrin, &c. Co.* [1894] 3 Ch. 589, 63 L. J. Ch. 795.

Infants'
Relief Act,
1874.

We must now consider the Act of 1874 (37 & 38 Vict. c. 62), which enacts as follows:—

1. All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute or by the rules of common law or equity enter, except such as now by law are voidable.

2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age.

3. This Act may be cited as The Infants' Relief Act, 1874.

Ratifica-
tion still
operative
for some
purposes.

The 2nd section (*m*) forbids an action to be brought on any promise or ratification of a contract made during infancy, and it applies to a ratification since the Act of a promise made in infancy before the passing of the Act (*n*), whether the agreement is or is not one of those included in s. 1 (*o*). It probably also prevents the ratification from being available by way of set-off (*p*). This, however, is a different thing from depriving the ratification of all effect. For it may have other effects than giving a right of action or set-off, and these are not touched. While the matter was governed by Lord Tenterden's Act (*m*) there were many cases where a contract made during infancy might be adopted or confirmed without any ratification in writing so as to produce important results. Thus in the case of a marriage settlement the married persons are bound not so

(*m*) It supersedes the 5th section of Lord Tenterden's Act (9 Geo. 4, c. 14), by which no ratification of such a contract could be sued upon unless in writing and signed by the party to be charged, since expressly repealed by the Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66).

(*n*) *Ex parte Kibble* (1875) L. R. 10 Ch. 373, 44 L. J. Bk. 63.

(*o*) *Coxhead v. Mullis* (1878) 3 C. P. D. 439, 47 L. J. C. P. 761. It

is held, however, that in a case which would before the Act have been one of ratification it may be left to the jury to say whether the conduct of the parties amounts to a new promise: *Ditcham v. Worrall* (1880) 5 C. P. D. 410, 49 L. J. C. P. 688, by Lindley and Denman JJ. diss. Lord Coleridge C.J.

(*p*) *Rawley v. Rawley* (1876) 1 Q. B. Div. 460, 45 L. J. Q. B. 675.

much by liability to be sued (though in some cases and for some purposes the husband's covenants are of importance) as by inability to interfere with the disposition of the property once made and the execution of the trusts once constituted: and so far as concerns this an infant's marriage settlement may, as we have seen, be sufficiently confirmed by his or her conduct after full age (*q*). Again an infant partner who does not avoid the partnership at his full age is, as between himself and his partners, completely bound by the terms on which he entered it without any formal ratification; and in taking the partnership accounts the Court would apply the same rule to the time of his minority as to the time after his full age. Again an infant shareholder who does not disclaim may after his full age, at any rate, be made liable for calls without any express ratification; on the contrary, the burden of proof is on him to show that he repudiated the shares within a reasonable time (*r*).

And as Lord Tenterden's Act did not formerly stand in the way of these consequences of the affirmation or non-repudiation of an infant's contract, so the Act of 1874 will not stand in the way of the same or like consequences in the future. In fact the operation of the present Act seems to be to reduce all voidable contracts of infants ratified at full age, whether the ratification be formal or not, to the position of agreements of imperfect obligation, that is, which cannot be directly enforced but are valid for all other purposes. Other examples of such agreements and of their legal effect will be found in the chapter specially assigned to that subject.

A collateral result of this enactment appears to be that one who has made a contract during his infancy is not *Semble, no specific performance for*

(*q*) *Davies v. Davies* (1870) L. R. 9 Eq. 468, 39 L. J. Ch. 343, *supra*, p. 60. In *Duncan v. Dixon* (1890) 44 Ch. D. 211, 59 L. J. Ch. 437, an attempt was made to bring an infant's marriage settlement within

s. 1, on the ground that it must be read as including all contracts whatever. The Act is not quite so ill-drawn as to admit this construction.

(*r*) See pp. 58, 66.

either party of any contract made during infancy.

Effect of proviso as to new consideration.

Of s. 1, making certain contracts void.

now able to obtain specific performance of it after his full age, for the same reason that he cannot and formerly could not do so sooner (s).

The proviso as to new consideration meets such cases as that of an attempt to set up as a new contract the compromise of an action brought on the original promise (t). It is reinforced by s. 5 of the Betting and Loans (Infants) Act, 1892, which absolutely avoids all agreements and instruments (even negotiable ones), made for the payment of money representing or connected with a loan advanced during infancy (u).

In the first section of the principal Act, the words concerning the purchase of goods are not free from obscurity. If we might construe the Act as if it said "for *payment for* goods supplied," &c., it would be clear enough: but it is not so clear what is the precise operation of an enactment that contracts "for goods supplied or to be supplied," other than necessities, shall be void. It seems to follow that no property will pass to the infant by the attempted contract of sale, and that if he pays the price or any part of it before delivery of the goods he may recover it back; as indeed he might have done before the Act, for the contract was voidable, and he was free to rescind it within reasonable time. But it does not follow that if the goods are delivered no property passes or that if they are paid for the money may be recovered back. At all events an infant who has paid for goods and received and used them cannot recover the money back (x). The contrary construction would be unreasonable, and is not required by the policy of the statute, which is to protect infants from running into debt, not to disable them from making purchases for ready money. It is certain that when a particular class of contracts is simply declared to be unlawful, this does not prevent property from passing by an

(s) *Flight v. Bolland* (1828) 4 Russ. 298, 28 R. R. 101, p. 61, *supra*.

(t) *Smith v. King* [1892] 2 Q. B. 543, 67 L. T. 420.

(u) 55 Vict. c. 4. The rest of the Act is criminal.

(x) *Valentini v. Canali* (1889) 24 Q. B. Div. 166, 59 L. J. Q. B. 74.

act competent of itself to pass it, though done in pursuance or execution of the forbidden contract (*y*). Moreover it has been held that an infant may be guilty of larceny as a bailee though the goods were delivered to him on an agreement void under the Act (*z*). On the whole it seems that the contract is voidable, but that goods actually delivered can be returned, and the price recovered back, only so far and so long as complete restitution is possible.

It has been suggested that the exception of "contracts for necessities" may include loans of money advanced and in fact used for the purpose of buying necessities. The point is not known to have been judicially considered.

It is doubtful whether a bond, bill of exchange, or note given by a man of full age, for which the consideration was in fact the supply of goods not necessities during his infancy, would be void under s. 1 (*a*). But s. 2 (which indeed seems altogether more useful than s. 1) would no doubt effectually prevent it from being enforced as between the immediate parties, though perhaps the words are not the most apt for that purpose.

The Building Societies Act, 1874, enables an infant to be a member, but this does not imply any exemption from the disability to mortgage his real estate created by the Infants' Relief Act: for that is not the sole purpose or a necessary purpose of membership (*aa*).

2. *Of the liability of infants on obligations incident to interests in permanent property.*

In an old case reported under various names in various books (*b*), it was decided that an infant lessee who con-

Liability on obligations incident to property, and espe-

(*y*) *Ayers v. South Australian Banking Co.* (1871) L. R. 3 P. C. 548, 559, 40 L. J. C. P. 22.

(*z*) *R. v. McDonald* (1885) 15 Q. B. D. 323, 52 L. T. 583.

(*a*) *Cp. Flight v. Reed* (1863) 1 H. & C. 703, 32 L. J. Ex. 265.

(*aa*) *Thurstan v. Nottingham, &c.*

P.

Building Soc. [1902] 1 Ch. 1, 71 L. J. Ch. 83, C. A.

(*b*) *Kettle v. Eliot* (1614) Rolle Ab. 1, 731, K., Cro. Jac. 320, Brownlow, 120, 2 Bulst. 69. See the judgment of the Court of Exchequer in *L. & N. W. Ry. Co. v. M'Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97.

cially as to
railway
shares.

tinues to occupy till he comes of full age is after his full age liable for arrears of rent incurred during his infancy. In like manner a copyholder who was admitted during his minority and has not disclaimed is bound to pay the fine (*c*). The same principle is applied to the case of infant shareholders in railway companies. An infant is not incapable of being a shareholder (*d*), and as such is *prima facie* liable when he comes of age to be sued for calls on his shares. He can avoid the liability (which, though regulated by statute, has the general incidents of contract) only by showing that he repudiated the shares either before attaining his full age (*e*), or in a reasonable time afterwards (*f*). A railway shareholder is not a mere contractor, but a purchaser of an interest in a subject of a permanent nature with certain obligations attached to it; and those obligations he is bound to discharge, though they arose while he was a minor, unless he has renounced the interest. A mere absence of ratification is no sufficient defence, even if coupled with the allegation that the defendant has derived no profit from the shares. For if the property is unprofitable or burdensome, it is the holder's business to disclaim it on attaining his full age, if not before; and perhaps he could not exonerate himself even during his minority by showing that the interest was not at the time beneficial, unless he actually disclaimed it (*g*). Comparing the ana-

(*c*) *Evelyn v. Chichester* (1765) 3 Burr. 1717.

(*d*) He can subscribe a memorandum of association: *Luxon & Co.* (No. 2) (1891) 40 W. R. 621.

(*e*) *Newry & Enniskillen Ry. Co. v. Coombe* (1849) 3 Ex. 565, 18 L. J. Ex. 325.

(*f*) A plea which merely alleged repudiation after full age was therefore held bad in *Dublin & Wicklow Ry. Co. v. Black* (1852) 8 Ex. 181, 22 L. J. Ex. 94. At one time it seems to have been thought that even an infant shareholder was made absolutely liable by the general form of the enactment in

the Companies Clauses Consolidation Act defining the liability of shareholders. See per Lord Denman C.J. and Patteson J. in *Cork & Bandon Ry. Co. v. Cazenove* (1847) 10 Q. B. 935. This view was afterwards abandoned as inconsistent with the established rule that general words in statutes are not to be construed so as to deprive infants, lunatics, &c., of the protection given to them by the common law.

(*g*) It is submitted that in such a case the disclaimer if made would conclusively determine his interest and not merely suspend it.

logous case of a lease, the Court said—"We think the more reasonable view of the case is that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and if he has not disclaimed, at all events unless he still be a minor" (*h*). Similarly an infant member of a building society who has purchased land by means of an advance from the society cannot claim to hold the property free from the society's charge for the money advanced (*i*). In all the decided cases the party appears to have been of full age at the time of the action being brought, but there is nothing to show that (except possibly in the case of a disadvantageous contract) he might not as well be sued during his minority.

The same results, except perhaps as to suing the shareholder while still a minor, would follow from the general principles of the law of partnership even if the company in which the shares were held had not any permanent property.

3. *Of the liability of an infant when the contract is for his benefit, and especially for necessities.*

Liability on beneficial contract. *Qu.* extent of the rule?

It has been laid down in general terms that if an agreement be for the benefit of an infant at the time, it shall bind him (*j*), or even that the contract is binding unless manifestly to the infant's prejudice (*k*). An infant's contract of apprenticeship (*l*), or an ordinary contract to work for wages, will, if it be reasonable, be considered binding on the infant, so that he may no less than an adult incur the statutory penalties for unlawfully absenting

(*h*) *L. & N. W. Ry. Co. v. M. Michael* (1850) 5 Ex. 114, 20 L. J. Ex. 97, 101.

(*i*) *Thurstan v. Nottingham Permanent Benefit Building Soc.* [1901] 1 Ch. 88; affirmed on this point [1902] 1 Ch. 1, 71 L. J. Ch. 83.

(*j*) *Maddon v. White* (1787) 2

T. R. 159, 1 R. R. 453.

(*k*) *Cooper v. Simmons* (1862) 7 H. & N. 707, 721; per Wilde B. Not so strongly put in the L. J. report, 31 L. J. M. C. 138, 144.

(*l*) *Wood v. Fenwick* (1842) 10 M. & W. 195.

himself from his master's employment (*m*). An infant entered the service of a railway company and, as a condition of the service, became a member of an insurance society established by the company; the funds were augmented by the company to the extent of five-sixths of the premiums payable by the members. The rules provided for compensation in all cases of accident not due to the member's own wilful act or gross negligence, and bound the members to accept the benefits of the society in lieu of any claims under the Employers' Liability Act. The Court of Appeal held that the infant was bound by this agreement as being on the whole for his benefit (*n*). But an action will not lie against an infant on a covenant in apprenticeship indentures (*o*); and if the terms are not reasonable the agreement is void for all purposes, so that an action will not lie against a stranger for enticing away the apprentice (*p*). Again there are many conceivable cases in which it might be for an infant's benefit, or at least not manifestly to his prejudice, to enter into trading contracts, or to buy goods other than necessities: one can hardly say for example that it would be manifestly to the disadvantage of a minor of years of discretion to buy goods on credit for re-sale in a rising market; yet there is

(*m*) In *Leslie v. Fitzpatrick* (1877) 3 Q. B. D. 229, 47 L. J. M. C. 22, a case of summary proceedings under the Employers and Workmen Act, 1875, it may be collected that the facts were of the same kind, though the employer's plaint was in terms for a breach of contract. As to infant apprentices in London see p. 74, below.

(*n*) *Clements v. L. & N. W. Ry. Co.* [1894] 2 Q. B. 482, 63 L. J. Q. B. 837. It seems, though it was not necessary to decide the point, that the principle of an infant's contract being valid when the Court is satisfied that it was for his benefit is not confined (as was argued for the plaintiff) to contracts of apprentice-

ship or labour: see especially the judgment of Kay L.J.

(*o*) *De Francesco v. Barnum* (No. 1) (1889) 43 Ch. D. 165, 59 L. J. Ch. 151.

(*p*) *De Francesco v. Barnum* (No. 2) (1890) 45 Ch. D. 430, 63 L. T. 438. A clause enabling the master to suspend the apprentice's wages in an event which may be due to the master's own act, say a lock-out, is not reasonable: *Corn v. Matthews* [1893] 1 Q. B. 310, 62 L. J. M. C. 61, C. A., dist. *Green v. Thompson* [1899] 2 Q. B. 1, 68 L. J. Q. B. 719, where the exception was of days when the business should be at a standstill by accidents beyond the control of the master.

no doubt whatever that such a contract would at common law be voidable at his option. A contract whereby an infant agrees with a railway company, in consideration of being allowed to make a certain habitual journey to and fro on special terms, to waive all claims for accident to himself or his property, is detrimental to the infant and not binding on him (*q*). Nor has it ever been suggested that an infant partner or shareholder is at liberty to disclaim at full age only in case the adventure has been unprofitable or is obviously likely to become so. However, inasmuch as since the Infants' Relief Act, 1874, an infant's contract, if not binding on him from the first, can never be enforced against him at all, it seems quite possible that the Courts may in future be disposed to extend rather than to narrow the description of contracts which are considered binding because for the infant's benefit (*r*).

3a. *Contracts for necessities.*

By the sale of Goods Act, 1893, s. 2—

Liability
for necessities.

... "Where necessities are sold and delivered to an infant . . . or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

"'Necessaries' in this section mean goods suitable to the condition in life of such infant . . . or other person, and to his actual requirements at the time of the sale and delivery."

This enactment is a legislative declaration of the law as settled by a series of authorities, of which the judgment of the Exchequer Chamber in *Ryder v. Wombwell* is the chief:—

"The general rule of law is clearly established, and is that an infant is

(*q*) *Flower v. L. & N. W. Ry. Co.*
[1894] 2 Q. B. 65, 63 L. J. Q. B.
647, C. A.

(*r*) In an action brought by an
infant, an undertaking given by the

infant's next friend is not binding
if the circumstances are such that it
cannot be for the infant's benefit:
Rhodes v. Swithenbank (1889) 22
Q. B. Div. 577, 58 L. J. Q. B. 287.

generally incapable of binding himself by a contract. To this rule there is an exception introduced, not for the benefit of the tradesman who may trust the infant, but for that of the infant himself. This exception is that he may make a contract for necessities, and is accurately stated by Parke B. in *Peters v. Fleming* (s). 'From the earliest time down to the present the word necessities is not confined in its strict sense to such articles as were necessary to the support of life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word necessities in its unqualified sense, but with the qualification above pointed out' (t).

What are necessities: a question of mixed fact and law.

What in any particular case may fairly be called necessary in this extended sense, is what is called a question of mixed fact and law: that is, a question for a jury, subject to the Court being of opinion that there is evidence on which the jury may not unreasonably find for the plaintiff.

The station and circumstances of the defendant and the particulars of the claim being first ascertained, it is then for the Court to say whether the things supplied are *prima facie* such as a jury may reasonably find to be necessities for a person in the defendant's circumstances, or "whether the case is such as to cast on the plaintiff the onus of proving that the articles are within the exception [*i.e.*, are necessities], and then whether there is any sufficient evidence to satisfy that onus." In the latter case the plaintiff must show that although the articles would generally not be necessary for a person in the defendant's position, yet there exist in the case before the Court special circumstances that make them necessary. Thus articles of diet which are *prima facie* mere luxuries may become necessities if prescribed by medical advice (u). It is said that in general the test of necessity is usefulness, and that nothing can be a necessary which cannot possibly be

(s) (1840) 6 M. & W. at p. 46.

(t) (1868) L. R. 4 Ex. 32, 38; in the Court below L. R. 3 Ex. 90, 38 L. J. Ex. 8.

(u) See *Wharton v. Mackenzie* (1844) 5 Q. B. 606, 13 L. J. Q. B. 130, and per Bramwell B. L. R. 3 Ex. at p. 96.

useful: but the converse does not hold, for a useful thing may be of unreasonably costly fashion or material. It is to be borne in mind that the question is not whether the things are such that a person of the defendant's means may reasonably buy and pay for them, but whether they can be reasonably said to be so necessary for him that, though an infant, he must obtain them on credit rather than go without. For the purpose of deciding this question the Court will take judicial notice of the ordinary customs and usages of society (*x*).

If the Court does not hold that there is no evidence on which the supplies in question may reasonably be treated as necessities, then it is for the jury to say whether they were in fact necessities for the defendant under all the circumstances of the case.

The Act has laid down, in accordance with the weight of authority (*y*), that the buyer's actual requirements must be considered. If the goods supplied are necessary, the tradesman will not be the less entitled to recover because he made no inquiries as to the infant's existing supplies; but if the infant is already so well supplied that these goods are in truth not necessary, the tradesman's ignorance of that fact will not make them necessary, and he cannot recover. There is no rule of law casting on him a positive duty to make inquiries, but he omits to do so at his peril. But the defendant having an income out of which he might keep himself supplied with necessities for ready money is not equivalent to his being actually supplied, and does not prevent him from contracting for necessities on credit (*z*).

Supply
from other
sources.

(*x*) L. R. 4 Ex. at p. 40.

(*y*) *Brayshaw v. Eaton* (1839) 5 Bing. N. C. 231, 7 Scott, 183, 50 R. R. 773; *Foster v. Redgrave* (1866) L. R. 4 Ex. 35, *n.*; to the contrary, *Ryder v. Wombwell* (1868) L. R. 3 Ex. 90, 38 L. J. Ex. 8; (the point was left open in Ex. Ch., L. R. 4 Ex. 42);

but this was dissented from in *Barnes v. Toye* (1884) 13 Q. B. D. 410, and (by members of the C. A. sitting as a Divisional Court) *Johnstone v. Marks* (1887) 19 Q. B. D. 509, 57 L. J. Q. B. 6.

(*z*) *Burghart v. Hall* (1839) 4 M. & W. 727, 51 R. R. 788. *Contra*

Apparent
means of
buyer not
material.

It would be natural for juries, if not warned against it, to fall into a way of testing the necessary character of supplies, not so much by what the means and position of the buyer actually were, as by what they appeared to be to the seller, and such a view was not altogether without countenance from authority (a). It is conceived, however, that the knowledge or belief of the tradesman has nothing to do with the question whether the goods are necessary or not. It may be said that the question for the Court will, as a rule, be whether articles of the general class or description were *prima facie* necessities for the defendant, and the question for the jury will be whether, being of a general class or description allowed by the Court as necessary, the particular items were of a kind and quality necessary for the defendant, having regard to his station and circumstances. For instance, it would be for the Court to say whether it was proper for the defendant to buy a watch on credit, and for the jury to say whether the particular watch was such a one as he could reasonably afford. But this will not hold in extreme cases. In *Ryder v. Wombwell* (b) the Court of Exchequer Chamber held, reversing the judgment of the majority below on this point, that because a young man must fasten his wristbands somehow it does not follow that a jury are at liberty to find a pair of jewelled solitaires at the price of 25*l.* to be necessities even for a young man of good fortune.

What the
term "ne-
cessaries"
includes.

Hitherto we have spoken of a tradesman supplying goods, this being by far the most common case. But the range of possible contracts for "necessaries" is a much

Mortara v. Hall (1834) 6 Sim. 465. The doctrine there laid down seems superfluous, for the supplies there claimed for (such as 209 pairs of gloves in half a year) could not have been reasonably found necessary in any case.

(a) In *Dalton v. Gib* (1839) 5 Bing. N. C. 128, 50 R. R. 758, and

Preface; 7 Scott, 117, much weight is given to the *apparent* rank and circumstances of the party. This amounts to supposing that an infant may be liable, by a kind of holding out, for goods which are not necessary in fact.

(b) (1868) L. R. 4 Ex. 32, 38 L. J. Ex. 8.

wider one. "It is clearly agreed by all the books that speak of this matter that an infant may bind himself to pay for his necessary meat, drink, apparel, physic [including, of course, fees for medical attendance, &c., as well as the mere price of medicines], and such other necessities and likewise for his good teaching and instruction, whereby he may profit himself afterwards" (c). Thus learning a trade may be necessary, and on that principle an infant's indenture of apprenticeship has been said to be binding on him (d). The preparation of a settlement containing proper provisions for her benefit has been held a necessary for which a minor about to be married may make a valid contract, apart from any question as to the validity of the settlement itself (e).

A more remarkable extension of the definition of necessities is to be found in the case of *Chapple v. Cooper* (f), where an infant widow was sued for her husband's funeral expenses. The Court held that decent burial may be considered a necessary for every man, and husband and wife being in law the same person, the decent burial of a deceased husband is therefore a necessary for his widow. It would perhaps have been better to adopt the broader ground that a contract entered into for the purpose of performing a moral and social, if not legal, duty, which it would have been scandalous to omit, is of as necessary a character as any contract for personal service or purchase of goods for personal use.

The supply of necessities to an infant creates only a liability as on simple contract, and it cannot be made the

The liability is on simple contract only.

(c) Bac. Abr. Infancy and Age, I. (4. 335). And see *Chapple v. Cooper* (1844) 13 M. & W. 252, 13 L. J. Ex. 286. As to instruction in trade, &c., *Walter v. Everard* [1891] 2 Q. B. 369, 60 L. J. Q. B. 738, C. A.

(d) *Cooper v. Simmons* (1862) 7 H. & N. 707, 31 L. J. M. C. 138,

per Martin B. See, however, p. 63, *supra*.

(e) *Helps v. Clayton* (1864) 17 C. B. N. S. 553, 34 L. J. C. P. 1, see the pleadings, and the judgment of the Court *ad fin*.

(f) (1844) 13 M. & W. 252, 13 L. J. Ex. 286.

ground of any different kind of liability. Coke says: "If he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him" (*g*). *A fortiori*, a deed given by an infant to secure the repayment of money advanced to buy necessaries is voidable (*h*). But in these and similar cases the infant's liability on simple contract, or rather *quasi*-contract, is not affected (*i*). An infant is not in any circumstances liable on a bill of exchange or promissory note (*k*).

What contracts an infant can make by custom;

There are some particular contracts of infants valid by custom. By custom incident to the tenure of gavelkind an infant may sell his land of that tenure at the age of fifteen, but the conveyance must be by feoffment, and is subject to other restrictions (*l*). This, however, is not really a capacity of contracting, for there is no reason to suppose that an action could be brought against the infant for a breach of the contract for sale, or specific performance of it enforced.

"Also by the custom of London an infant unmarried and above the age of fourteen, though under twenty-one, may bind himself apprentice to a freeman of London by indenture with proper covenants; which covenants by the custom of London shall be as binding as if he were of full age," and may be sued upon in the superior courts as well as in the city courts (*m*).

—by statute.

Infants, or their guardians in their names, are empowered by statute (11 Geo. 4 & 1 Wm. 4, c. 65, ss. 16, 17) to grant renewals of leases, and make leases under the direction of the Court of Chancery, and in like manner to surrender

(*g*) Co. Lit. 172 *a*, cp. 4 T. R. 363.

(*h*) *Martin v. Gale* (1876) 4 Ch. D. 428, 46 L. J. Ch. 84.

(*i*) *Walter v. Everard* [1891] 2 Q. B. 369, 60 L. J. Q. B. 738, C.A.

(*k*) *Re Soltykoff, Ex parte Margrett* [1891] 1 Q. B. 413, 60 L. J. Q. B. 339, C.A.

(*l*) Robinson on Gavelkind, 194.

(*m*) Bacon, Abr. Infancy, B. 4, 340; 21 E. IV. 6, pl. 17.

leases and accept new leases (s. 12) (*n*). And by a later Act (18 & 19 Vict. c. 43) (*o*), infants may with the sanction of the Court make valid marriage settlements of both real and personal property.

4. *Of an infant's immunity as to wrongs connected with contract.*

Infant not liable for wrong where the claim is in substance *ex contractu*.

An infant is generally no less liable than an adult for wrongs committed by him, subject only to his being in fact of such age and discretion that he can have a wrongful intention, where such intention is material; but he cannot be sued for a wrong, when the cause of action is in substance *ex contractu*, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women (*p*), the law does not allow. Thus it was long ago held that an infant innkeeper could not be made liable in an action on the case for the loss of his guest's goods (*q*). There is another old case reported in divers books (*r*), where it was decided that an action of deceit will not lie upon an assertion by a minor that he is of full age. It was said that if such actions were allowed all the infants in England would be ruined, for though not bound by their contracts, they would be made liable as for tort; and it appears in Keble's report that an infant had

(*n*) See Dan. Ch. Pr. 2. 1917; *Re Clark* (1866) L. R. 1 Ch. 292, 35 L. J. Ch. 314; *Re Letchford* (1876) 2 Ch. D. 719, 45 L. J. Ch. 530. (The provisions as to renewals of leases extend also to married women.)

(*o*) This Act does not affect coverture or any disability other than infancy: *Seaton v. Seaton* (1888) 13 App. Ca. 61, 57 L. J. Ch. 661. And *qu.* whether it applies to post-nuptial settlements. It does apply to covenants to settle after-acquired property: *Moore v.*

Johnson [1891] 3 Ch. 48, 60 L. J. Ch. 499.

(*p*) See p. 80, *infra*.

(*q*) Rolle Ab. 1. 2, Action sur Case, D. 3.

(*r*) *Johnson v. Pie* (1665) Sid. 258, 1 Lev. 169, 1 Keb. 913, fully cited by Knight Bruce V.C. in *Stikeman v. Dawson* (1847) 1 De G. & Sm. 113, 16 L. J. Ch. 205; and see other cases collected *ib.* at p. 110, where "the case mentioned in Keble" is that which, as stated in the text, occurs in his report of *Johnson v. Pie*.

But liable for wrong apart from contract, though touching the subject-matter of a contract.

already been held not liable for representing a false jewel not belonging to him as a diamond and his own. The modern case usually cited for this rule is *Jennings v. Randall* (s), where it was sought to recover damages from an infant for overriding a hired mare. But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable. The distinction is established and well marked by a modern case where an infant had hired a horse for riding, but not for jumping, the plaintiff refusing to let it for that purpose; the defendant allowed his companion to use the horse for jumping, whereby it was injured and ultimately died. It was held that using the horse in this manner, being a manner positively forbidden by the contract, was a mere trespass, for which the defendant was liable (t).

Qu. whether liable on contract implied in law.

It is doubtful whether an infant can be made liable *quasi ex contractu* (as for money received), when the real cause of action is a wrong independent of contract; but since the Judicature Acts have abolished the old forms of action, the question seems of little importance (u).

In equity liable and bound by his acts, &c., if he represent

5. Liability in equity on representation of full age.

When an infant has induced persons to deal with him by falsely representing himself as of full age, he incurs an

(s) 8 T. R. 335, 4 R. R. 680. It is also recognized in *Price v. Hewett* (1852) 8 Ex. 146 (not a decision on the point).

(t) *Burnard v. Haggis* (1863) 14 C. B. N. S. 45, 32 L. J. C. P. 189. A bailment at will would have been determined, as where a bailee commits theft at common law by "breaking bulk."

(u) The liability is affirmed by Leake (p. 470), and disputed by Mr. Dicey (on Parties, 284), who is supported by a dictum of Willes J. assuming that infancy would be a good plea to an action for money received, though substantially founded on a wrong. *Alton v. Midland Ry. Co.* (1865) 19 C. B. N. S. at p. 241, 34 L. J. C. P. at p. 297.

obligation in equity, which however in the case of a contract is not an obligation to perform the contract, and must be carefully distinguished from it (*x*). Indeed it is not a contractual obligation at all. It is limited to the extent we have stated above (p. 55), and the principle on which it is founded is often expressed in the form: "An infant shall not take advantage of his own fraud." A review of the principal cases will clearly show the correct doctrine. In *Clarke v. Cobley* (*y*) the defendant being a minor had given his bond to the plaintiff for the amount of two promissory notes made by the defendant's wife before the marriage, which notes the plaintiff delivered up. The plaintiff, on discovering the truth, and after the defendant came of age, filed his bill praying that the defendant might either execute a new bond, pay the money, or deliver back the notes. The Court ordered the defendant to give back the notes, and that he should not plead to any action brought on them the Statute of Limitation or any other plea which he could not have pleaded when the bond was given; but refused to decree payment of the money, holding that it could do no more than take care that the parties were restored to the same situation in which they were at the date of the bond. In *Lemprière v. Lange*, a quite recent case, it was held that an infant who had obtained the lease of a furnished house by representing himself of full age could not be made liable for use and occupation, although the lease could be set aside and the infant ordered to pay the costs of the action (*z*). *Cory*

himself as of full age: but only to the extent of any advantage thereby gained.

(*x*) *Acc. Bartlett v. Wells* (1862) 1 B. & S. 836, 31 L. J. Q. B. 57. Declaration for goods sold, &c. Plea, infancy. Equitable replication, that the contract was induced by defendant's fraudulent representation that he was of age. The replication was held bad, as not meeting the defence, but only showing a distinct equitable right collateral to the cause of action

sued upon.

(*y*) (1789) 2 Cox, 173, 2 R. R. 25. It must be taken, though it is not clear by the report, that the defendant falsely represented himself as of full age.

(*z*) (1879) 12 Ch. D. 675. Followed on the question of costs, *Woolf v. Woolf* [1899] 1 Ch. 343, 68 L. J. Ch. 82.

v. *Gertcken* (a) shows that when an infant by falsely representing himself to be of full age has induced trustees to pay over a fund to him, neither he nor his representatives can afterwards charge the trustees with a breach of trust and make them pay again. *Overton v. Banister* (b) confirms this: it was there held, however, that the release of an infant *cestui que trust* in such a case is binding on him only to the extent of the sum actually received by him. The later case of *Wright v. Snowe* (c) seems not to agree with this, though *Overton v. Banister* was cited, and apparently no dissent expressed. There a legatee had given a release to the executrix, representing himself to her solicitor as of full age; afterwards he sued for an account, alleging that he was an infant at the date of the release. The infancy was not sufficiently proved, and the Court would not direct an inquiry, considering that in any event the release could not be disturbed. This appears to go the length of holding the doctrine of estoppel applicable to the class of representations in question, and if that be the effect of the decision its correctness may perhaps be doubted. In *Stikeman v. Dawson* (d) the subject of infant's liability for wrongs in general is discussed in an interesting judgment by Knight Bruce V.-C. and the important point is decided that in order to establish this equitable liability it must be shown that the infant actually represented himself to be of full age; it is not enough that the other party did not know of his minority. And as there must be an actual false representation, so it has been more lately held that no claim for restitution can be sustained unless the representation actually misled the person to whom it was made. No relief can be given if the party was not in fact deceived, but knew the truth at the time; and it makes no difference where the business

There must be a positive representation, not mere dissimulation: and the other party must be in fact misled.

(a) (1816) 2 Madd. 40, 17 R. R. 180.

(b) (1844) 3 Ha. 503.

(c) (1848) 2 De G. & Sm. 321.

(d) (1847) 1 De G. & Sm. 90, 16 L. J. Ch. 205.

was actually conducted by a solicitor or agent who did not know (c).

A minor cannot be adjudicated a bankrupt in the absence of an express representation to the creditor that he was of full age. The mere fact of trading cannot be taken as a constructive representation (f). But if a minor has held himself out as an adult, and so traded and been made bankrupt, he cannot have the bankruptcy annulled on the ground of his infancy (g); and a loan obtained on the faith of an express representation that he is of full age is a claim provable in bankruptcy (h).

Proof in
bank-
ruptcy.

A transaction of this kind cannot stand in the way of a subsequent valid contract with another person made by the infant after he has come of age; and the person who first dealt with him on the strength of his representing himself as of age acquires no right to interfere with the performance of the subsequent contract (i). This is another proof that the infant's false representation gives no additional force to the transaction as a contract.

But subse-
quent
valid con-
tract after
full age
prevails.

It was also held in the case referred to that, assuming the first agreement to have been only voidable, it was clearly avoided by the act of the party in making another contract inconsistent with it after attaining his full age. But it has been decided in Ireland (as we have seen) that this is not so in the case of a lease granted by an infant; the making of another lease of the same property to another lessee after the lessor has attained full age is not enough to avoid the first lease (k). The fact that an

(c) *Nelson v. Stocker* (1859) 4 De G. & J. 458, 28 L. J. Ch. 751.

(f) *Ex parte Jones* (1881) 18 Ch. Div. 109, 50 L. J. Ch. 673, overruling *Ex parte Lynch* (1876) 2 Ch. D. 227, 45 L. J. Bk. 48.

(g) *Ex parte Watson* (1809) 16 Ves. 265; *Ex parte Bates* (1841) 2 Mont. D. & D. 337.

(h) *Ex parte Unity Bank* (1858) 3 De G. & J. 63, 27 L. J. Bk. 33; see observations of Jessel M.R. thereon, 18 Ch. D. at p. 121.

(i) *Inman v. Inman* (1873) L. R. 15 Eq. 260.

(k) *Slator v. Brady* (1863) 14 Ir. C. L. Rep. 61, *supra*, p. 57.

interest in property and a right of possession has passed by the first lease, though voidable, explains the distinction.

II. MARRIED WOMEN.

Married women can contract only as to separate property. Old common law disability.

A married woman is capable of binding herself by a contract only "in respect of and to the extent of her separate property" (*l*). This limited capacity is created by a statute founded on the practice of the Court of Chancery, which for more than a century had protected married women's separate interests in the manner to be presently mentioned. Except as to separate property the old common law rule still exists, though with greatly diminished importance. That rule is that a married woman cannot bind herself by contract at all.

If she attempts to do so "it is altogether void, and no action will lie against her husband or herself for the breach of it" (*m*). And the same consequence follows as in the case of infants, namely, that although a married woman is answerable for wrongs committed by her during the coverture, including frauds, and may be sued for them jointly with her husband, or separately if she survives him, yet she cannot be sued for a fraud where it is directly connected with a contract with her, and is the means of effecting it and parcel of the same transaction, *e. g.*, where the wife has obtained advances from the plaintiff for a third party by means of her guaranty, falsely representing herself as sole (*m*); but it is doubtful whether this extends to all cases of false representation by which credit is obtained (*n*). For the same reason—that the law will not allow the contract to be indirectly enforced—a married

(*l*) Married Women's Property Act, 1882, 45 & 46 Vict. c. 75, s. 1.

(*m*) Per Cur. *Fairhurst v. Liverpool Adelphi Loan Association* (1854)

9 Ex. 422, 429, 23 L. J. Ex. 164.

(*n*) *Wright v. Leonard* (1861) 11 C. B. N. S. 258, 30 L. J. C. P. 365, where the Court was divided.

woman is not estopped from pleading coverture by having described herself as *sui iuris* (o).

The fact that a married woman is living and trading apart from her husband does not enable her at common law to contract so as to give a right of action against herself alone (p). Nor does it make any difference if she is living separate from her husband under an express agreement for separation, as no agreement between husband and wife can change their legal capacities and characters (q).

But "a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which will survive to her on the death of the husband, unless he shall have interfered by doing some act to reduce it into possession": thus she might, before the Married Women's Property Act, buy railway stock, and become entitled to sue for dividends jointly with her husband (r). When a third person assents to hold a sum of money at the wife's disposal, but does not pay it over, this is conferring on her a chose in action within the meaning of the rule (s).

But may acquire contractual rights: for her husband's benefit if he exercise them during the coverture; otherwise for her own, if she survive.

During the joint lives of the husband and wife the husband is entitled *iure mariti* to receive any sum thus due; "but if the wife dies before the husband has received it, the husband, although his beneficial right remains the same, must in order to receive the money take out administration to his wife; and if he dies without having done so, it is necessary that letters of administration should be taken out to the wife's estate (for such is still the legal character of the money), but the wife's administrator is

(o) *Cannam v. Farmer* (1849) 3 Ex. 698.

(p) *Clayton v. Adams* (1796) 6 T. R. 605.

(q) *Marshall v. Rutton* (1800) 8 T. R. 545, 5 R. R. 448.

(r) Per Cur. *Dalton v. Midland Ry. Co.* (1853) 13 C. B. 474, 22 L. J. C. P. 177. And see 1 Wms. Saund.

P.

222, 223. On the question what amounts to reduction into possession, see Williams on Executors, 1. 743 sqq. (9th ed.), *Widgery v. Tepper* (1877) 5 Ch. D. 516, 7 Ch. Div. 423, 47 L. J. Ch. 550.

(s) *Fleet v. Perrins* (1869) L. R. 3 Q. B. 536, 4 Q. B. 500, 38 L. J. Q. B. 257.

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Advocate High Court

Jammu & Kashmir

only a trustee for the representative of the husband" (*t*). Accordingly the Court of Probate cannot dispense with the double administration, even where the same person is the proper representative of both husband and wife, and is also beneficially entitled (*u*).

Cannot
during
coverture
renew debt
barred by
Stat. of
Limita-
tion.

Inasmuch as according to the view established by modern decisions a promise to pay a debt barred by the Statute of Limitation operates not by way of post-dating the original contract so as to "draw down the promise" then made, but as a new contract founded on the subsisting consideration, a married woman's general incapacity to contract prevents such a promise, if made by her, from being effectual; and where before the marriage she became a joint debtor with another person, that person's acknowledgment after the marriage is also ineffectual, since to bind one's joint debtor an acknowledgment must be such as would have bound him if made by himself (*x*).

The rules of law concerning a wife's power to bind her husband by contract, either as his actual or ostensible agent or, in some special circumstances, by a peculiar authority independent of agency, do not fall within the province of this work.

Excep-
tions:
Queen
Consort.

Exceptions at common law.—The wife of the King of England may sue and be sued as a *feme sole* (Co. Litt. 133 *a*).

Wife of
person
civilly
dead.

The wife of a person civilly dead may sue and be sued alone (*Ib.* 132 *b*, 133 *a*). The cases dwelt on by Coke are such as practically cannot occur at this day, and it seems that the only persons who can now be regarded as civilly dead are persons convicted of felony, and not lawfully at

(*t*) Per Lord Westbury, *Partington v. Att.-Gen.* (1869) L. R. 4 H. L. 100, 119.

(*u*) *In the Goods of Harding* (1872)

L. R. 2 P. & D. 394.

(*x*) *Pittam v. Foster* (1823) 1 B. & C. 248, 25 R. R. 385; 1 Wms. Saund. 172.

large under any licence (*y*). An alien enemy, though disabled from suing, is not civilly dead, and his wife cannot sue alone on a contract made with her either before or during coverture; so that while he is an alien enemy neither of them can maintain an action on the contract. The remedy may thus be irrecoverably lost by the operation of the Statute of Limitation, but this inconvenience does not take the case out of the general rule (*z*). This decision does not expressly overrule any earlier authority (and there is such authority) (*a*) for the proposition that she may be sued alone. But it is conceived that such must be the result.

It appears to be the result of the authorities that the wife of an alien husband who has never been or at least never resided in England may bind herself by contract if she purports to contract as a *feme sole* (*b*).

“By the custom of London, if a *feme covert*, the wife of a freeman, trades by herself in a trade with which her husband does not intermeddle, she may sue and be sued as a *feme sole*, and the husband shall be named only for

Of alien not resident in the kingdom.

Custom of London as to married woman trading alone.

(*y*) Transportation was considered as an abjuration of the realm, which could be determined only by an actual return after the sentence had expired: *Carrol v. Blencow* (1801) 4 Esp. 27. The analogy to Coke’s “Civil Death” is discussed, *arg.* in *Ex parte Franks* (1831) 7 Bing. 762.

(*z*) *De Wahl v. Braune* (1856) 1 H. & N. 178, 25 L. J. Ex. 343. Perhaps it may be doubted whether “civil death” was ever really appropriate as a term of art in English courts except “when a man entereth into religion [*i.e.* a religious order in England] and is professed”: in that case he could make a will and appoint executors (who might be sued as such for his debts, F. N. B. 121, O.), and if he did not, his goods could be administered (Litt. s. 200, Co. Litt. 131 *b*). Bracton,

however, speaks of outlawry (426 *b*) as well as religious profession (301 *b*) as *mors civilis*. A person under the penalties of *præmunire*, which include being put out of the King’s protection, would, I suppose, be in the same plight as an outlaw. The Roman *mors civilis* was a pure legal fiction, introduced not to create disabilities, but to obviate the inconvenient results of disabilities otherwise created. (Sav. Syst. 2. 164.) As to the *mort civile* of modern French law (now abolished since 1854), see *ib.* 151 *sqq.*

(*a*) *Derry v. Duchess of Mazarine* (1697) 1 Ld. Raym. 147.

(*b*) *Barden v. Keverberg* (1836) 2 M. & W. 61, 6 L. J. Ex. 66. But the question is now of little interest.

conformity; and if judgment be given against them, she only shall be taken in execution." (Bacon, Abr. Customs of London, D.) This custom applies only to the city courts (*c*), and even there the formal joinder of the husband is indispensable. But if acted upon in those courts it may be pleaded as matter of defence in the superior courts (*d*), though they do not otherwise notice the custom (*e*).

Contracts with husband as to separation, &c., may be good.

In certain exceptional cases in which the wife has an adverse interest to the husband she is not incapable of contracting with him. Where a wife had instituted a suit for divorce, and she and her husband had agreed to refer the matters in dispute to arbitration, her next friend not being a party to the agreement, the House of Lords held that under the circumstances of the case she might be regarded as a *feme sole*, that the agreement was not invalid, and that the award was therefore binding (*f*).

The real object of the reference and award in this case having been to fix the terms of a separation, it was later held that the Court would not refuse to enforce an agreement to execute a deed of separation merely because it was made between the husband and wife without the intervention of a trustee (*g*). In the simpler case of an agreement to live apart, with incidental provisions for maintenance, the agreement does not require the intervention of a trustee, and the wife (apart from the Married Women's Property Act, which does not apply) can sue the husband for arrears of maintenance due under it (*h*). It

(*c*) *Caudell v. Shaw* (1791) 4 T. R. 361.

(*d*) *Beard v. Webb* (1800) 2 Bos. & P. 93. Since the Act of 1882 the only effect of the custom, if any, seems to be that a married woman trading in the City of London may be subject to greater personal liability than elsewhere.

(*e*) *Caudell v. Shaw*, 4 T. R. 361.

(*f*) *Bateman v. Countess of Ross* (1813) 1 Dow, 235, 14 R. R. 55.

(*g*) *Vansittart v. Vansittart* (1858) 4 K. & J. 62, 27 L. J. Ch. 222; but the agreement not enforceable for other reasons; affirmed on appeal, 2 De G. & J. 249, 27 L. J. Ch. 289; but no opinion given on this point.

(*h*) *McGregor v. McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 591.

does not follow that in such transactions a married woman has all the powers of a *feme sole*. She has only those which the necessity of the case requires. She is apparently competent to compromise the suit with her husband (i): but she cannot, as a term of the compromise, bind her real estate (not being settled to her separate use) without the acknowledgment required by the Fines and Recoveries Act (k).

Statutory exceptions other than Married Women's Property Act. Statutory exceptions:

By the Act constituting the Court for Divorce and Matrimonial Causes, 20 & 21 Vict. c. 85, a wife judicially separated from her husband is to be considered whilst so separated as a *feme sole* for the purposes of (*inter alia*) contract, and suing and being sued in any civil proceeding (s. 26) (l); and a wife deserted by her husband who has obtained a protection order is in the same position while the desertion continues (s. 21). This section is so worded as when taken alone to countenance the supposition that the protection order relates back to the date of desertion. It has been decided, however, that it does not enable the wife to maintain an action commenced by her alone before the date of the order (m). Her powers of disposing and contracting apply only to property acquired after the decree for separation or the desertion (or protection order?) as the case may be (n). These provisions are extended by

Judicial separations and protection orders.

(i) *Rowley v. Rowley* (1866) L. R. 2 Sc. & D. 63.

(k) *Cahill v. Cahill* (1883) 8 App. Ca. 420.

(l) The same consequences follow *a fortiori* on a dissolution of marriage, though there is no express enactment that they shall: *Wilkinson v. Gibson* (1867) L. R. 4 Eq. 162, 36 L. J. Ch. 646; see also, as to the divorced wife's rights, *Wells v. Malbon* (1862) 31 Beav. 48, 31 L. J. Ch. 344; *Fitzgerald v. Chap-*

man (1875) 1 Ch. D. 563, 45 L. J. Ch. 23; *Burton v. Sturgeon* (1876) 2 Ch. Div. 318, 45 L. J. Ch. 633.

(m) *Midland Ry. Co. v. Pye* (1861) 10 C. B. N. S. 179, 30 L. J. C. P. 314.

(n) *Waite v. Morland* (1888) 38 Ch. Div. 135, 57 L. J. Ch. 655; *Hill v. Cooper* [1893] 2 Q. B. 85, 62 L. J. Q. B. 423, C. A. As to the combined effect of this Act and s. 4 of the Married Women's Property Act, 1882, in making pro-

an amending Act in certain particulars not material to be noticed here (21 & 22 Vict. c. 108, ss. 6-9); and third parties are indemnified as to payments to the wife, and acts done by her with their permission, under an order or decree which is afterwards discharged or reversed (s. 10). The words as to "suing and being sued" in this section are not confined by the context to matters of property and contract, but are to be liberally construed: a married woman who has obtained a protection order may sue in her own name for a libel (*o*).

Equitable doctrine of separate estate.

In the eighteenth century, if not earlier, the Court of Chancery recognized and sanctioned the practice of settling property upon married women to be enjoyed by them for their separate use and free of the husband's interference or control. To this was added, towards the end of that century, the curious and anomalous device of settling property in trust for a married woman "without power of anticipation," so that she cannot deal in any way with the income until it is actually payable. During the nineteenth century a doctrine was elaborated, not without difficulty and hesitation, under which a married woman having separate property at her disposal (not subject to the peculiar restraint just mentioned) might bind that property, though not herself personally, by transactions in the nature of contract. Some account of this doctrine is given for reference in the Appendix, as being useful, if not necessary, for the full understanding of the modern law.

It should be observed that restraint on anticipation, being allowed only for the purpose of protecting the fund

property subject to a married woman's disposing power assets for the payment of her debts, see *Re Hughes* [1898] 1 Ch. 529, 67 L. J. Ch. 279, C. A.

(*o*) *Ramsden v. Brearley* (1875)

L. R. 10 Q. B. 147, 44 L. J. Q. B. 46. She can give a valid receipt for a legacy not reduced into possession before the date of the order: *Re Coward & Adam's Purchase* (1875) L. R. 20 Eq. 179, 44 L. J. Ch. 384.

as capital, does not apply to income of the fund when it reaches the married woman's hands, or the hands of some person from whom she can immediately demand it. The income so paid or payable is ordinary separate property, and therefore on principle not exempt from the subsequent claims, equitable or statutory, of the married woman's creditors (*p*).

The Married Women's Property Act.

The provisions of the Married Women's Property Act, 1882, extended by an amending Act of 1893, are so much wider that they may be described as a new body of law, consolidating and superseding the results of many cases in equity as well as the previous Acts of 1870 and 1874, which this Act repealed. The law, as now declared, is to this effect:

Separate property is

- (i) Property acquired by any married woman after January 1, 1883, including earnings (*q*):
- (ii) Property belonging at the time of marriage to a woman marrying after January 1, 1883 (*r*).

Special trusts created in favour of a married woman by will, settlement or otherwise, are not affected by the Act (*s*).

Subject to any settlement (*t*), a married woman can bind herself by contract "in respect of and to the extent

(*p*) See *Hood Barrs v. Heriot* [1896] A. C. 174, 65 L. J. Q. B. 352; *Whiteley v. Edwards* [1896] 2 Q. B. 48, 65 L. J. Q. B. 457, C. A.; this principle seems to have been overlooked by the C. A. in construing the Act of 1893 in *Barnett v. Howard* [1900] 2 Q. B. 784, 69 L. J. Q. B. 955. See Mr. T. Cyprian Williams's remarks in L. Q. R. xvii. 4.

(*q*) Ss. 5, 25. Property falling into possession since the Act under a title acquired before it is not included: *Reid v. Reid* (1886) 31 Ch.

Div. 402, 55 L. J. Ch. 294.

(*r*) S. 2.

(*s*) S. 19, which "prevents the previous enactment from interfering with any settlement which would have bound the property if the Act had not passed": Cotton L.J. *Hancock v. Hancock* (1888) 38 Ch. Div. 78, 90, 57 L. J. Ch. 396. This provision covers both s. 2 and s. 5. See *Buckland v. Buckland* [1900] 2 Ch. 534, 69 L. J. Ch. 648.

(*t*) See *Stonor's Trusts* (1883) 24 Ch. D. 195, 52 L. J. Ch. 776.

of her separate property," and can sue and be sued alone (*u*).

Damages and costs, if recovered by her, become her separate property; if against her, are payable out of her separate property and not otherwise (*x*). A married woman trading alone can be made bankrupt in respect of her separate property (*y*).

A contract made by a married woman

- (i) Is deemed to be made with respect to and to bind her separate property (*z*), and, if made since 5 Dec. 1893, whether or not she has any separate property at the date of the contract (*a*):
- (ii) If so made and binding, binds her after-acquired separate property (*b*), provided, as to contracts of earlier date than 5 Dec. 1893, that there was some separate property at the date of the contract (*c*).

A married woman's separate property is liable for her ante-nuptial debts and obligations (*d*). She is also liable at common law for such debts, and judgment may go against her personally (*e*). She cannot avoid this liability by settling the property on herself without power of anti-

(*u*) As to the retrospective operation of the Act with regard to power to sue on a cause independent of contract, see *Weldon v. Winslow* (1884) 13 Q. B. Div. 784, 53 L. J. Q. B. 528. As to liability on causes independent of contract, *Whittaker v. Kershaw* (1890) 45 Ch. Div. 320, 60 L. J. Ch. 9. The general words of s. 1 (1) do not give any greater power of disposal than is given by the specific words of ss. 2 and 5, with which s. 1 must be read: *Re Cuno, Mansfield v. Mansfield* (1889) 43 Ch. Div. 12, 62 L. T. 15.

(*x*) S. 1, sub-s. 2.

(*y*) S. 1, sub-s. 5. An unexecuted general power of appointment is not "separate property," and a married woman cannot be compelled to execute such a power for the benefit of her creditors: *Ex parte Gilchrist* (1886) 17 Q. B. Div.

521, 55 L. J. Q. B. 578. S. 19 does not prevent property to which she is entitled under a settlement, without restraint on anticipation, from passing to the trustee in bankruptcy: *Ex parte Boyd* (1888) 21 Q. B. Div. 264, 57 L. J. Q. B. 553.

(*z*) Formerly there was no such presumption unless she was living apart from her husband. See Appendix, Note C.

(*a*) 56 & 57 Vict. c. 63.

(*b*) 56 & 57 Vict. c. 63, ss. 1, 4.

(*c*) *Stogdon v. Lee* [1891] 1 Q. B. 661, 60 L. J. Q. B. 669, C. A.

(*d*) S. 13. This liability is at least doubtful in cases not under the Act: see Note C. As to the Act of 1870, *Arford v. Reid* (1889) 22 Q. B. Div. 548, 58 L. J. Q. B. 230.

(*e*) *Robinson, King & Co. v. Lynes* [1894] 2 Q. B. 577, 63 L. J. Q. B. 759.

cipation (*f*). As to women married before January 1, 1883, such liability applies only to separate property acquired by them under the Act (*g*).

The Act contains other provisions as to the effect of the execution of general powers by will by married women (*h*), the title to stocks and other investments registered in a married woman's name either solely or jointly (*i*), the effecting of life assurances by a married woman, or by either husband or wife for the benefit of the family (*j*), procedure for the protection of separate property (*k*), and other matters which belong more to the law of Property than to the law of Contract.

It is not expressly stated by the principal Act whether on the termination of the coverture by the death of the husband, or by divorce, a married woman's debts contracted during the coverture with respect to her separate property do or not become her personal debts; but it has been assumed that they do (*l*), and the Act of 1893 expressly makes this the rule for contracts subsequent to its date (*m*). If not, the only remedy would be against her separate property which existed as such during the coverture, and was not subject to restraint on anticipation (*n*), so far as it could still be identified and followed.

The Act does not remove the effects of a restraint on anticipation. A married woman's creditor is not enabled to have execution or any incidental remedies against property subject to such restraint (*o*); though this affects only the remedy, not the cause of action (*p*). But the Act of

(*f*) S. 19.

(*g*) See note (*d*), last page.

(*h*) *Re Ann* [1894] 1 Ch. 549, 63 L. J. Ch. 334.

(*i*) Ss. 6-10.

(*j*) S. 11.

(*k*) S. 12.

(*l*) *Harrison v. Harrison* (1888) 13 P. Div. 180; *Leak v. Driffield* (1889) 24 Q. B. D. 98.

(*m*) 56 & 57 Vict. c. 63, s. 1 (*c*).

(*n*) *Pelton Bros. v. Harrison*

[1891] 2 Q. B. 422, 60 L. J. Q. B. 74, C. A.

(*o*) *Draycott v. Harrison* (1886) 17 Q. B. D. 147. But he may when the restraint is removed by the husband's death: *Briggs v. Ryan* [1899] 2 Ch. 717, 68 L. J. Ch. 663—at any rate a trustee in bankruptcy may: *ib.*

(*p*) *Whittaker v. Kershaw* (1890) 45 Ch. Div. 320, 327, 60 L. J. Ch. 9.

1893 gives power to order costs to be paid out of such property (*q*) in any action or proceeding instituted by or on behalf of a married woman (*r*).

It was settled under the Act of 1882, after some difference of judicial opinions, that income of separate property subject to restraint on anticipation is, when paid or accrued due, "free money" and liable to satisfy a judgment not of prior date to the date of such income becoming payable (*s*). It has since been held that s. 1 of the Act of 1893 has the effect of abrogating this rule, and protecting the income actually payable from separate property which was subject to restraint on anticipation at the date of the contract, even if the restraint on the capital has been removed by the cessation of the coverture before the date of the judgment: but the soundness of this decision appears exceedingly questionable (*t*), and it is practically certain that the result is in any case foreign to the intention of the Act.

A married woman cannot free herself from a restraint on anticipation attached to any property held for her separate use by any act of her own, whether in the nature of admission, estoppel, or otherwise (*u*).

Where the surviving husband of a married woman takes her separate estate *iure mariti*, he is at once her "legal personal representative" for the purposes of the Act, and liable to her creditors to the extent of that separate estate (*x*).

(*q*) 56 & 57 Vict. c. 63, s. 2. S. 1 does not make such property liable to satisfy a contract. See the proviso.

(*r*) *Hood Barrs v. Catheart* [1894] 3 Ch. 376, 63 L. J. Ch. 793, C. A., approved, *Hood Barrs v. Heriot* [1897] A. C. 177, 66 L. J. Q. B. 356. This does not apply to motions, appeals, or other steps taken in a cause by a married woman who is a defendant: but it does apply to a counterclaim by

her: *Hood Barrs v. Catheart* [1895] 1 Q. B. 873, 64 L. J. Q. B. 520.

(*s*) *Hood Barrs v. Heriot* [1896] A. C. 174, 65 L. J. Q. B. 352.

(*t*) *Barnett v. Howard* [1900] 2 Q. B. 784, 69 L. J. Q. B. 955; see p. 87, above.

(*u*) *Bateman v. Faber* [1898] 1 Ch. 144, 67 L. J. Ch. 130, C. A.

(*x*) S. 23 of the principal Act, as applied in *Surman v. Wharton* [1891] 1 Q. B. 491, 60 L. J. Q. B. 233.

On the other hand the Act does not exclude such equitable rights and remedies against a married woman's separate estate as were previously recognized. Where a married woman carries on a separate business, her husband can sue her for advances made during the coverture for the purposes of that business (*y*), on the general principle that in respect of her separate estate she is treated as a *feme sole*. And it may still be possible in some cases not within the Act to enforce a married woman's contract by means of the equitable doctrine of imperfect exercise of a power (*z*).

With regard to a husband's liability for his wife's antenuptial debts, the Court of Appeal has decided in a considered judgment that it is distinct, and not merely a joint liability with the wife's separate estate; but that, for the purposes of the Statute of Limitation, there is not a distinct cause of action accruing against the husband at the date of the marriage (*a*).

III. LUNATICS AND DRUNKEN PERSONS.

It will be convenient to consider these causes of disability together, since in our modern law drunken men (so far as their capacity of contracting is affected at all) are on the same footing as lunatics.

Drunken-
ness and
Lunacy.

The old law as to a lunatic's acts was that he could not be admitted to avoid them himself, though in certain cases the Crown, and in other cases his heir could (*b*). Even the fact of a defendant having been found lunatic by inquisition was not conclusive as against a plaintiff who was not present at the inquisition (*c*). A lunatic who has lucid intervals has apparently always been held capable of

Old law as
to luna-
tics.

(*y*) *Butler v. Butler* (1885) 16 Q. B. Div. 374, 55 L. J. Q. B. 55.

(*z*) See per Fry L.J. *Ex parte Gilchrist* (1886) 17 Q. B. Div. at p. 532.

(*a*) *Beck v. Pierce* (1889) 23 Q. B.

Div. 316, 58 L. J. Q. B. 516.

(*b*) See the judgment of Fry L.J. in *Imperial Loan Co. v. Stone* [1892] 1 Q. B. at p. 601.

(*c*) *Hall v. Warren* (1804) 9 Ves 605, 609, 7 R. R. at p. 308.

contracting (among other acts) during such intervals (*d*). The marriage of a lunatic is void, and the same degree of sanity is required for marriage as for making a will or for any other purpose, though the burden of proof is on the party alleging insanity (*e*). Marriage, however, is a peculiar transaction, and the exceptional treatment of it in our law, though perhaps historically due to the influence, in ecclesiastical Courts, of more general rules of civil or canon law, may well be justified on grounds of convenience.

Liability
for neces-
saries, &c.

It is equally settled that a lunatic or his estate may be liable *quasi ex contractu* for necessities supplied to him in good faith (*f*); and this applies to all expenses necessarily incurred for the protection of his person or estate, such as the cost of the proceedings in lunacy (*g*). A person who supplies necessities to a lunatic or provides money to be expended in necessities knowing him to be such can have an action against the lunatic if he incurred the expense with the intention, at the time, that it should be repaid. The circumstances must be such as to justify the Court in implying an obligation to repay; there is no doubt that such an obligation may exist in a proper case (*h*). A husband is liable for necessities supplied to his wife while he is lunatic; for the wife's authority to pledge his credit for necessities is not a mere agency, but springs from the relation of husband and wife and is not revoked by the husband's insanity (*i*). In the same way drunkenness or lunacy would be no answer to an action for money had and received, or for the price of goods furnished to a drunken or insane man and kept by him after he had recovered his

(*d*) *Beverley's case* (1603) 4 Co. Rep. 123 *b*; *Hall v. Warren*, last note.

(*e*) *Hancock v. Peaty* (1867) L. R. 1 P. & D. 335, 341, 36 L. J. Mat. 57; with which *Durham v. Durham* (1885) 10 P. D. 80 does not conflict on this point. The statute 15 Geo. 2, c. 30, is rep. by the Stat. Law Revision Act, 1873.

(*f*) *Bagster v. Earl of Portsmouth* (1826) 5 B. & C. 170, s. c. more

fully, nom. *Baxter v. Earl P.*, 7 D. & R. 614. As to goods sold and delivered, Sale of Goods Act, 1893, s. 2.

(*g*) *Williams v. Wentworth* (1842) 5 Beav. 325; *Stedman v. Hart* (1854) Kay, 607.

(*h*) *Re Rhodes* (1890) 44 Ch. Div. 94, 59 L. J. Ch. 298.

(*i*) *Read v. Legard* (1851) 6 Ex. 636, 20 L. J. Ex. 309.

reason: in this last case, however, his conduct in keeping the goods would be evidence of a new contract to pay for them (*k*).

There is also express authority (which one would think hardly necessary) to show that contracts made by a man of sound mind who afterwards becomes lunatic are not invalidated by the lunacy (*l*). It seems that an agency is determined by the principal becoming insane, except as to persons who deal in good faith with the agent in ignorance of the principal's insanity (*m*).

No intelligible reason is given for the early rule that a lunatic (or person who had been under temporary mental incapacity) should not be received "to disable his own person," and it has long been discarded. Suggestions, but only suggestions, may be found in various later cases to the effect that, on the contrary, a lunatic's acts are absolutely void.

The modern rule, however, as to the contract of a lunatic or drunken man who by reason of lunacy or drunkenness is not capable of understanding its terms or forming a rational judgment of its effect on his interests is that such a contract is voidable at his option, but only if his state is known to the other party. The defendant who sets up his own incapacity as a defence must prove not only that incapacity but the plaintiff's knowledge of it at the date of the contract (*n*).

Present law: Contract voidable if the lunacy, &c., known to other party.

In *Molton v. Camroux* the action was brought by *Molton v. Camroux*.

(*k*) *Gore v. Gibson* (1845) 13 M. & W. 623, 14 L. J. Ex. 151.

(*l*) *Owen v. Davies*, 1 Ves. Sr. 82.

(*m*) See *Drew v. Nunn* (1879) 4 Q. B. Div. 661, 48 L. J. Q. B. 591.

(*n*) *Molton v. Camroux*, in Ex. Ch. (1848) 2 Ex. 487, 4 Ex. 17, 18 L. J. Ex. 68, 356; *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599, 61 L. J. Q. B. 449, C. A. The same principle had long before been

acted upon in equity, but without deciding whether there was a contract at law: *Niell v. Morley* (1804) 9 Ves. 478. The rule is apparently peculiar to the Common Law, and is impugned by a learned civilian as unjust to the lunatic: Prof. Goudy, "Contracts by Lunatics," L. Q. R. xvii. 147. See *contra* Mr. Rankine Wilson, "Lunacy in relation to Contract, Tort, and Crime," L. Q. R. xviii. 21.

administrators to recover the money paid by the intestate to an assurance and annuity society as the price of two annuities determinable with his life. The intestate was of unsound mind at the date of the purchase, but the transactions were fair and in the ordinary course of business, and his insanity was not known to the society. It was held that the money could not be recovered; the rule being laid down in the Exchequer Chamber in these terms: "The modern cases show that when that state of mind was unknown to the other contracting party, and no advantage was taken of the lunatic, the defence cannot prevail, especially where the contract is not merely executory but executed in the whole or in part, and the parties cannot be restored altogether to their original positions."

The context shows that the statement was considered equally applicable to lunacy and drunkenness, and the law thus stated involves though it does not expressly enounce the proposition that the contract of a lunatic or drunken man is not void but at most voidable. The general rules as to the rescission of a voidable contract are then applicable, and among others the rule that it must be rescinded, if at all, before it has been executed, so that the former state of things cannot be restored: which is the point actually decided. The decision itself was fully accepted and acted on (*o*), though the merely voluntary acts of a lunatic, *e. g.*, a voluntary disentailing deed (a class of acts with which we are not here concerned) remain invalid (*p*). The complete judicial interpretation of the result of *Molton v. Camroux* (*q*) was given in *Matthews v. Baxter* (*r*). The declaration was for breach of contract in not completing a purchase: plea, that at the time of making the alleged contract the defendant was so drunk as to be incapable of

Develop-
ment of
the doc-
trine:
Matthews
v. Baxter.

(*o*) *Beavan v. M'Donnell* (1854) 9 Ex. 309, 23 L. J. Ex. 94; *Price v. Berrington* (1850-1) 3 Mac. & G. 486, 495, revg. s. c. 7 Ha. 394; *Elliot v. Ince* (1857) 7 D. M. G.

475, 488, 26 L. J. Ch. 821.

(*p*) *Elliot v. Ince*, last note.

(*q*) Note (*n*), last page.

(*r*) (1873) L. R. 8 Ex. 132, 42 L. J. Ex. 73.

transacting business or knowing what he was about, as the plaintiff well knew: replication, that after the defendant became sober and able to transact business he ratified and confirmed the contract. As a merely void agreement cannot be ratified, this neatly raised the question whether the contract were void or only voidable: the Court held that it was only voidable, and the replication therefore good.

In *Imperial Loan Co. v. Stone* (s) a defendant sued on a promissory note set up the defence of insanity at the time of making the note. The jury found that he was insane when he signed the note, and could not agree whether the plaintiffs' agent, then present, knew of his insanity or not. It was held that this could not be taken as a verdict for the defendant, but there must be a new trial. The Court was unanimous, and the decision may be taken as finally settling the law if there was still any room for doubt. It also shows that a distinction formerly suggested between executed and executory contracts is not tenable.

*Imperial
Loan Co.
v. Stone.*

The special doctrine of our Courts with regard to partnership (which is a continuing contract) is quite in accordance with this: it has long been established that the insanity of a partner does not of itself operate as a dissolution of the partnership, but is only a ground for dissolution by the Court.

It is to be noted that the existence of partial delusions does not necessarily amount to insanity for the purposes of this rule. The judge or jury, as the case may be, must in every case consider the practical question whether the party was incompetent to manage his own affairs in the matter in hand (t).

Partial
delusions
compatible
with
capacity
for con-
tracting.

(s) [1892] 1 Q. B. 599, 61 L. J. Q. B. 449, C. A. It does not appear from the argument as reported how counsel for the defendant dealt with *Molton v. Camroux*, which was binding on the Court.

(t) *Jenkins v. Morris* (1880) 14 Ch. Div. 674; compare remark of Bramwell L.J. in *Drew v. Nunn* (1879) 4 Q. B. Div. at p. 669, 48 L. J. Q. B. 591.

IV. CONVICTS, ETC.

Disability
of con-
victs.

At common law convicted felons (as also outlaws) could not sue, but remained liable to be sued, on contracts made by them during outlawry or conviction (*u*). Since the Act to abolish forfeitures for treason and felony, convicts are incapable of suing or making any contract, except while they are lawfully at large under any licence (*x*).

Alien
enemies.

Alien enemies, as we have seen above, are disabled from suing in an English Court even if the cause of action arose in time of peace (*y*), but not from binding themselves by contract during war between their country and England, nor from enforcing such a contract after the war has ceased (*z*), unless meanwhile the right of action has been barred by the Statute of Limitation.

PART II.

Extension
of powers.

We now come to the extensions by special institutions of the ordinary power of making contracts. And first of agency.

I. AGENCY.

Agency.

We have not here to do with the relations created between principal and agent by agency regarded as a species of contract, but only with the manner in which rights and duties accrue to the principal through the dealings of the agent. We must also distinguish cases of real agency from those where the agency is apparent only, and we shall further notice, for the sake of completeness, the position of the true or apparent agent as regards third persons.

(*u*) Dicey on Parties, 4.

(*x*) 33 & 34 Vict. c. 23, ss. 8, 30.

(*y*) *Le Bret v. Papillon* (1804) 4

East, 502, 7 R. R. 618.

(*z*) *De Wahl v. Braune* (1856) 1 H. & N. 178, 25 L. J. Ex. 343: note (*z*), ante, p. 83.

A person who contracts or professes to contract on behalf of a principal may be in any one of the following positions :

1. Agent having authority (whether at the time or by subsequent ratification) to bind his principal.

(A) known to be an agent

(α) for a principal named ;

(β) for a principal not named.

(B) not known to be an agent (*a*).

2. Holding himself out as agent, but not having authority to bind his principal.

(A) where a principal is named

(α) who might be bound, but does not in fact authorize or ratify the contract ;

(β) who in law cannot be bound.

(B) where the alleged principal is not named.

1. As a rule an agent may be appointed without any special formality ; though an agent to execute a deed must himself be appointed by deed, and in certain cases the appointment is required by the Statute of Frauds to be in writing. Revocation of an agent's authority takes place either by the principal's actual withdrawal of his will to be represented by the agent (which may be known either by express declaration or by conduct manifesting the same intention) or by his dying or ceasing to be *sui iuris*, and thus becoming incapable of continuing it (*b*). In these last cases the authority is said to be revoked by the act of the law. "The termination of the authority of an agent does not, so far as regards the agent, take effect

Authority of agent, its constitution and termination.

(*a*) Since the cases of *Calder v. Dobell*, *Fleet v. Murton*, and *Hutchinson v. Tatham* (see following notes), it may perhaps be considered that the true leading distinction is whether the agent is

known to be an agent or not, rather than whether the principal is named or not.

(*b*) On the whole subject see at large Story on Agency, §§ 474, sqq.

before it becomes known to him, or, so far as regards third persons, before it becomes known to them" (*c*). It is held in England, but anomalously, that this rule does not apply to revocation by the death of the principal (*d*). It does apply in the case of the principal becoming insane, and it may perhaps yet be decided that in the case of death the principal's estate is liable to the other party for the actual loss incurred by the principal's representation—which, as regards him, was a continuing one at the date of the contract—that the agent was authorized (*e*).

Ratification must in every case be within a reasonable time, and where a time is expressly limited within which an act must be done, and an unauthorized person purports to do it on behalf of the principal within that time, a ratification after the time has expired will not serve (*f*).

Authority conferred by ratification relates back, as against the other party as well as the principal, to the date of the act done by the agent (*g*).

1. Agent
for exist-
ing prin-
cipal.

In all cases where there is an authorized agent dealing on behalf of a real principal, the intention of the parties determines whether the agent, or the principal, or both, are to be liable on the contract and entitled to enforce it. The question is to whom credit was really given (*h*). And

(*c*) I. C. A. 208, cp. Story on Agency, § 470; *Trueman v. Loder* (1840) 11 A. & E. 589, 52 R. R. 451.

(*d*) *Blades v. Free* (1829) 9 B. & C. 167, 32 R. R. 620; *Smout v. Ilbery* (1843) 10 M. & W. 11. *Contra*, I. C. A. s. 208 (Illust. *c*.), Code Nap. 2008, 2009, and German Civil Code, ss. 167—171; and see Kent, Comm. 2. 646. The dissolution of a company has the same effect as the death of a natural person: *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43, 69 L. J. Ch. 20.

(*e*) *Drew v. Nunn* (1879) 5 Q. B. Div. 661; see per Brett L.J. at p. 668.

(*f*) *Dibbins v. Dibbins* [1896] 2 Ch. 348, 65 L. J. Ch. 724.

(*g*) *Bolton Partners v. Lambert* (1889) 41 Ch. Div. 295, 58 L. J. Ch. 425 (see, however, the note on this case in Fry on Specific Performance, 3rd ed.); *McClintock v. S. Penn. Oil Co.* [1892] 28 Am. St. Rep. 785; *Re Tiedemann* [1899] 2 Q. B. 66, 68 L. J. Q. B. 852. As to ratification by an undisclosed principal, see p. 103, below.

(*h*) Story on Agency, §§ 279, sqq. 288. *Thomson v. Davenport* (1829) 9 B. & C. 78, 32 R. R. 578; *Calder v. Dobell* (1871) L. R. 6 C. P. 486, 40 L. J. C. P. 224.

the general rules laid down on the subject furnish only provisional answers, which may be displaced (subject to the rules as to admissibility of evidence) by proof of a contrary intention.

A. When the agent is known to be an agent, a contract is made, and knowingly made, by the other party with the principal, on which the principal is the proper person to sue and be sued.

A. Known to be an agent: contract with principal *ab initio*.

And when the principal is named at the time, then there is *prima facie* no contract with the agent: but when the principal is not named, then *prima facie* the agent, though known to be an agent, does bind himself personally, the other party not being presumed to give credit exclusively to an unknown principal (*i*).

α. Principal named: agent *prima facie* does not contract in person.

But when the agent would not *prima facie* be a contracting party in person he may become so in various ways. Thus he is personally liable if he expressly undertakes to be so (*k*): such an undertaking may be inferred from the general construction of a contract in writing, and is always inferred when the agent contracts in his own name without qualification (*l*), though the principal is not the less also liable, whether named at the time or not (*m*), or if he himself has an interest in the subject-matter of

β. Principal not named: agent *prima facie* does contract in person. Evidence of contrary intention (*α*).

(*i*) But one who deals with an agent known to be such cannot set off against the principal's claim a debt due to him from the agent. If he has employed an agent on his own part, that agent's knowledge is for this purpose treated as the employer's own: and this even though the knowledge was not acquired in the course of the particular employment: *Dresser v. Norwood* (1863) Ex. Ch., 17 C. B. N. S. 466, 34 L. J. C. P. 48, revg. s. c. 14 C. B. N. S. 574, 32 L. J. C. P. 201. *Contra* I. C. A. s. 229. *Qu.* by design or accident?

(*k*) Story on Agency, § 269, Smith, Merc. Law, 158.

(*l*) See *Fairlie v. Fenton* (1870) L. R. 5 Ex. 169, 39 L. J. Ex. 107; *Paice v. Walker* (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109. The latter case, however, goes too far; see note (*s*), p. 101.

(*m*) *Higgins v. Senior* (1841) 8 M. & W. 834: the law there laid down goes to superadd the liability of the agent, not to take away that of the principal: *Calder v. Dobell* (1871) L. R. 6 C. P. 486, 40 L. J. C. P. 224.

the contract, as in the case of an auctioneer (*n*). And when the agent is dealing in goods for a merchant resident abroad, it is held on the ground of mercantile usage and convenience that without evidence of express authority to that effect the commission agent cannot pledge his foreign constituent's credit, and therefore contracts in person (*o*).

Technical
rule as to
deed of
agent.

When a deed is executed by an agent as such but purports to be the deed of the agent and not of the principal, then the principal cannot sue or be sued upon it at law, by reason of the technical rule that those persons only can sue or be sued upon an indenture who are named or described in it as parties (*p*). And it is also held that a party who takes a deed under seal from an agent in the agent's own name elects to charge the agent alone (*q*). A similar rule has been supposed to exist as to negotiable instruments: but modern decisions seem to show that when an agent is in a position to accept bills so as to bind his principal, the principal is liable though the agent signs not in the principal's name but in his own, or, it would appear, in any other name. It is the same as if the principal had signed a wrong name with his own hand (*r*).

Evidence
of con-

Again, an agent who would otherwise be liable on the

(*n*) 2 Sm. L. C. 399. As to an auctioneer's personal liability for non-delivery to a purchaser of goods bought at the auction, *Woolfe v. Horne* (1877) 2 Q. B. D. 355, 46 L. J. Q. B. 534; *New Zealand Land Co. v. Watson* (1881) 7 Q. B. Div. 374, 50 L. J. Q. B. 433.

(*o*) *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598, 605, *Acc. Elbinger Actien-Gesellschaft v. Claye* (1873) L. R. 8 Q. B. 313, 41 L. J. Q. B. 253 (affirmed on another point, L. R. 9 Q. B. 473, 43 L. J. Q. B. 211), showing that the foreign principal cannot sue on the contract: *Hutton v. Bulloch* (1873) L. R. 8 Q. B. 331, affirmed in Ex. Ch. L. R. 9 Q. B. 572, that he cannot be sued: *New Zealand Land Co. v. Watson* (1881) 7 Q. B. D. 374, 50

L. J. Q. B. 433. In *Maspons y Hermano v. Mildred* (1883) 9 Q. B. Div. 530, 53 L. J. Q. B. 33, the Court of Appeal refused to extend this doctrine to a case where the commission agent as well as the principal was foreign; the decision was affirmed in H. L., 8 App. Ca. 874, but this point not discussed.

(*p*) *Lord Southampton v. Brown* (1827) 6 B. & C. 718, 30 R. R. 511; *Beckham v. Drake* (1841) 9 M. & W. at p. 95, affirmed sub nom. *Drake v. Beckham*, 11 ib. 315, 12 L. J. Ex. 486.

(*q*) *Pickering's claim* (1871) L. R. 6 Ch. 525.

(*r*) *Lindus v. Bradwell* (1848) 5 C. B. 583, 17 L. J. C. P. 123. Cp. *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97, 35 L. J. Q. B. 20.

contract made by him may exempt himself from liability by contracting in such a form as makes it appear on the face of the contract that he is contracting as agent only and not for himself as principal (*s*): but even then he may be treated as a contracting party and personally bound as well as his principal by the custom of the particular trade in which he is dealing (*t*). Or he may limit his liability by special stipulations, *e.g.* when a charter-party is executed by an agent for an unnamed freighter, and the agent's signature is unqualified, but the charter-party contains a clause providing that the agent's responsibility shall cease as soon as the cargo is shipped (*u*).

It is also a rule that an agent for a government is not personally a party to a contract made by him on behalf of that government by reason merely of having made the contract in his own name (*x*). In some cases the agent, though *prima facie* not a party to the contract as agent, can yet sue or be sued as principal on a contract which he has made as agent. These will be mentioned under another head of this subject (*y*).

(*s*) Words in the body of a document which amount to a personal contract by the agent are not deprived of their effect by a qualified signature: *Lennard v. Robinson* (1855) 5 E. & B. 125, 24 L. J. Q. B. 275; *Hutcheson v. Eaton* (1884) 13 Q. B. Div. 861, see per Brett M. R. at p. 865; and the description of him as agent in the body of the document may under special circumstances not be enough to make him safe: *Paice v. Walker* (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109; see the remarks on that case in *Gadd v. Houghton* (1876) 1 Ex. Div. 357, 46 L. J. Ex. 71, which decides that a contract "on account of" a named principal conclusively discharges the agent. *Paice v. Walker* is nearly but not quite overruled: see *Hough v. Manzanos* (1879) 4 Ex. D. 104, 48 L. J. Ex. 398.

(*t*) *Humfrey v. Dale* (1857) 7 E.

& B. 266, E. B. & E. 1004, 26 L. J. Q. B. 137; *Fleet v. Murten* (1871) L. R. 7 Q. B. 126, 129, 41 L. J. Q. B. 49; *Hutchinson v. Tatham* (1873) L. R. 8 C. P. 482, 42 L. J. C. P. 260; *Pike v. Ongley* (1887) 18 Q. B. Div. 708, 56 L. J. Q. B. 373. On the general question of the construction of contracts made by brokers for their principals, see *Southwell v. Bowditch* (1876) 1 C. P. Div. 374, 45 L. J. C. P. 374, 630.

(*u*) *Oglesby v. Yglesias* (1858) E. B. & E. 930, 27 L. J. Q. B. 356; *Carr v. Jackson* (1852) 7 Ex. 382, 21 L. J. Ex. 137.

(*x*) *Macbeath v. Haldimand* (1786) 1 T. R. 172, cp. *ib.* 674, 1 R. R. 177; *Gidley v. Lord Palmerston* (1822) 3 Brod. & B. 275, 24 R. R. 668; Story on Agency, § 302, sqq.

(*y*) *Infra*, pp. 109—111.

Where an undertaking is given in general terms, no promisee being named, to a person who obviously cannot be a principal in the matter, it may be inferred as a fact from the circumstances that some other person interested is the real unnamed principal, and that person may recover on the contract (z).

B. Agent not known to be an agent. Generally there is a contract with the undisclosed principal.

B. When a party contracts with an agent whom he does not know to be an agent, the undisclosed principal is generally bound by the contract and entitled to enforce it, as well as the agent with whom the contract is made in the first instance (a).

It has been held that an undisclosed principal is as much liable as a known one for contracts made by the agent within the general apparent authority of agents in that business (b).

Exceptions.

But the limitations of this rule are important. In the first place, it does not apply where an agent for an undisclosed principal contracts in such terms as import that he is the real and only principal. There the principal cannot afterwards sue on the contract (c). Much less, of course, could he do so if the nature of the contract itself (for instance, partnership) were inconsistent with a principal unknown at the time taking the place of the apparent contracting party. Likewise, "if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name" (d).

It was long undecided whether an agent for an undis-

(z) *Weidner v. Hoggett* (1876) 1 C. P. D. 533.

(a) The rule is not excluded by the contract being in writing (not under seal) and signed by the agent in his own name: *Beckham v. Drake* (1841) 9 M. & W. at p. 91. See p. 100, *supra*.

(b) *Watteau v. Fenwick* [1893] 1 Q. B. 346; *sed qu.*, see L. Q. R. ix. 111.

(c) *Humble v. Hunter* (1848) 12 Q. B. 310, 17 L. J. Q. B. 350.

(d) *Ferrand v. Bischoffsheim* (1858) 4 C. B. N. S. 710, 716, 27 L. J. C. P. 302.

closed principal must have authority at the time, or a man might adopt as principal an act not purporting at the time to be done on behalf of any principal, and not then authorized by him. A majority of the Court of Appeal held in a late case that such ratification was possible, but this was reversed by the House of Lords as contrary to such authority as there was (with one obscure exception) and to the general reluctance of the Common Law to give effect to alleged intentions which were not disclosed or recorded at the time when, if at all, they were material (*e*).

Again, in the cases to which the rule does apply, the rights of both the undisclosed principal and the other contracting party are qualified as follows:

Limitations of the rule when it applies. As to rights of principal.

The principal "must take the contract subject to all equities in the same way as if the agent were the sole principal" (*f*). Accordingly if the principal sues on the contract the other party may avail himself of any defence which would have been good against the agent (*g*): thus a purchaser of goods through a factor may set off a claim against the factor in an action by the factor's principal for the price of the goods (*h*). "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification,

(*e*) *Durant v. Roberts & Co.* [1900] 1 Q. B. 629, 69 L. J. Q. B. 382, *diss.* A. L. Smith L. J., *revd. nom.* *Keighley, Maxsted & Co. v. Durant* [1901] A. C. 240, 70 L. J. K. B. 662.

(*f*) Story on Agency, § 420; per Parke B. *Beckham v. Drake* (1841) 9 M. & W. at p. 98. P. 100, *supra*.

(*g*) If the agent sues in his own name the other party cannot set off a debt due from the principal whom he has in the meantime discovered, there being no mutual debt within the statute of set-off; *Isberg v. Bowden* (1853) 8 Ex. 852, 22 L. J. Ex. 322. Under the Judicature Acts, however, he can make the

principal a party to the action by counter-claim and have the whole matter disposed of.

(*h*) *George v. Clagett* (1797) 7 T. R. 359, 4 R. R. 462; *Sims v. Bond* (1833) 5 B. & Ad. 389, 393, 39 R. R. 511, 515. Per Cur., *Isberg v. Bowden*, 8 Ex. at p. 859. It does not matter whether the factor is or is not actually authorized by his principal to sell in his own name without disclosing the agency: *Ex parte Dixon* (1876) 4 Ch. Div. 133, 46 L. J. Bk. 20; nor what restrictions may, as between himself and the principal, be imposed on him as to the price he is to sell at: *Stevens v. Biller* (1883) 25 Ch. Div. 31.

that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent" (i). And his claim to be allowed such set-off is not effectually met by the reply that when he dealt with the agent he had the means of knowing that he was only an agent. The existence of means of knowledge is not material except as evidence of actual knowledge (k). On the other hand this equity against an undisclosed principal depends (so the House of Lords has held) on the third person's actual belief that he was dealing with a principal in that particular transaction. Mere absence of knowledge or belief whether the agent is dealing as an agent or on his own account is not enough (l).

As to
rights of
the other
party.

It has been said that conversely the right of the other contracting party to hold the principal liable is subject to the qualification that the state of the account between the principal and the agent must not be altered to the prejudice of the principal. But this doctrine has been disapproved by the Court of Appeal as going too far. The principal is discharged as against the other party by payment to his own agent only if that party has by his conduct led the principal to believe that he has settled with the agent, or, perhaps, if the principal has in good faith paid the agent at a time when the other party still gave credit to the agent alone, and would naturally, from some peculiar character of the business or otherwise, be supposed by the principal to do so (m).

(i) Per Willes J. *Dresser v. Norwood* (1863) 14 C. B. N. S. 574, 589, 32 L. J. C. P. 201, 205. The reversal of this case in the Ex. Ch. 17 C. B. N. S. 466, 34 L. J. C. P. 48, does not affect this statement of the general law. The principle is not confined to the sale of goods, e.g. *Montagu v. Forwood* [1893] 2 Q. B. 350, C.A.

(k) *Borries v. Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38, 43 L. J. C. P. 3.

(l) *Cooke v. Eshelby* (1887) 12 App. Ca. 271, 56 L. J. Q. B. 505. It is useless to criticize the decision in England; but see L. Q. R. iii. 358.

(m) *Irvine v. Watson* (1880) 5 Q. B. Div. 414, 49 L. J. Q. B. 531, which

Again, the other party may choose to give credit to the agent exclusively after discovering the principal, and in that case he cannot afterwards hold the principal liable; and statements or conduct of the party which lead the principal to believe that the agent only will be held liable, and on the faith of which the principal acts, will have the same result (*n*). And though the party may elect to sue the principal, yet he must make such election within a reasonable time after discovering him (*o*). When it is said that he has a right of election, this means that he may sue either the principal or the agent, or may commence proceedings against both, but may only sue one of them to judgment; and a judgment obtained against one, though unsatisfied, is a bar to an action against the other. Such is the rule as to principal and agent in general, and there is no exception in the case of a shipowner and freighter (*p*).

The mere commencement of proceedings against the agent or his estate after the principal is discovered, although it may possibly be evidence of an election to charge the agent only, does not amount to an election in point of law (*q*).

2. We have now to point out the results which follow when a man professes to make a contract as agent, but is in truth not an agent, that is, has no responsible principal.

2. Pro-
fessed
agent not
having
authority.

We may put out of consideration all cases in which the

seems on this point to reduce the authority of *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598, 41 L. J. Q. B. 313, to that of a decision on peculiar facts.

(*n*) Story on Agency, §§ 279, 288, 291; *Horsfall v. Fautleroy* (1830) 10 B. & C. 755; but the principal is not discharged unless he has actually dealt with the agent on the faith of the other party's con-

duct so as to change his position: *Wyatt v. Hertford* (1802) 3 East, 147.

(*o*) *Smethurst v. Mitchell* (1859) 1 E. & E. 622, 28 L. J. Q. B. 241.

(*p*) *Priestley v. Fernie* (1865) 3 H. & C. 977, 983, 34 L. J. Ex. 173; cp. L. R. 6 C. P. 499.

(*q*) *Curtis v. Williamson* (1874) L. R. 10 Q. B. 57, 44 L. J. Q. B. 27.

professed agent is on the face of the contract personally bound as well as his pretended principal: for his own contract cannot be the less valid because the contract he professed at the same time to make for another has no effect. But when the contract is not by its form or otherwise such as would of itself make the professed agent a party to it there are several distinctions to be observed.

Principal
named.

First, let us take the cases where a principal is named. The other party *prima facie* enters into the contract on the faith of that principal's credit. But credit cannot be presumed to be given except to a party who is capable of being bound by the contract: hence it is material whether the alleged principal is one who might authorize or ratify the contract, but does not, or is one who could not possibly do so.

α. Who
might be
respon-
sible.

α. The more frequent case is where the party named as principal is one who might be responsible.

It is settled law that there, subject to the qualifications which will appear, the pretended agent has not either the rights or the liabilities of a principal on the contract.

Professed
agent
cannot sue
on the
contract.

First, as to his rights. In *Bickerton v. Burrell* (r) the plaintiff had signed a memorandum of purchase at an auction as agent for a named principal. Afterwards he sued in his own name to recover the deposit then paid from the auctioneer, and offered evidence that he was really a principal in the transaction. But he was nonsuited at the trial, and this was upheld by the full Court, who laid down that "where a man assigns himself as agent to a person named, the law will not allow him to shift his position, declaring himself principal and the other a creature of straw. . . . A man who has dealt with another as agent (s) is not at liberty to retract that character *without notice* and to turn round and sue in the

(r) (1816) 5 M. & S. 383.

(s) *I.e.* for a named and responsible principal.

character of principal. The plaintiff misled the defendant and was bound to undeceive him before bringing an action." This leaves it doubtful what would have been the precise effect of the plaintiff giving notice of his real position before suing: but the modern cases seem to show that it would only have put the defendant to his election to treat the contract as a subsisting contract between himself and the plaintiff or to repudiate it at once. One reported case, however (*t*), appears to be directly opposed to *Bickerton v. Burrell*. The facts were shortly these. Lord Gwydyr was entitled as Deputy Grand Chamberlain to the decorations used in Westminster Hall at the coronation of George IV. He sold these to the plaintiff Fellowes, who re-sold them to the defendant Page at an advanced price, but professed to be selling as the agent of Lord Gwydyr, and signed the agreement for sale in that character. Fellowes, being unable to procure Lord Gwydyr's consent to his name being used in an action, sued Page in his own name in equity for a balance due on the agreement. It was argued for the defendant that he had been misled "as to a most important ingredient in the contract, as to the person, namely, with whom he had really contracted" (*u*). However it was held by Sir John Leach V.C. and by Lord Lyndhurst on appeal, that Page could not resist the performance of the contract without showing that he had been actually prejudiced by having it concealed from him that Fellowes was the real principal. It is submitted that this decision is contrary to the principles laid down in *Bickerton v. Burrell* and the other cases to be presently cited, and is not law (*x*).

Contra in equity.
Fellowes v. Lord Gwydyr: sed qu.

(*t*) *Fellowes v. Lord Gwydyr* (1826-9) 1 Sim. 63, 1 Russ. & M. 83, 32 R. R. 148.

(*u*) 1 Russ. & M. at pp. 85, 88.

(*x*) It may have been right on the facts, on the ground that Page continued to act under the contract after knowing the true state of things (as was said in argument

for the plaintiff, 1 Russ. & M. 83, 32 R. R. 151), which would bring the case within *Rayner v. Grote* (1846) 15 M. & W. 359, 16 L. J. Ex. 79, but this is not mentioned in the judgments. Equitable cause of action there was really none. No judicial comment on the case has been met with.

Rayner v.
Grote.

The doctrine under consideration was further defined in *Rayner v. Grote* (y). There the plaintiff sued to recover a balance due upon the sale by him to the defendants of a quantity of soda ash according to a bought note in this form:—"I have this day bought for you the following goods from J. & T. Johnson—50 tons soda ash, . . . J. H. Rayner." It was proved that the plaintiff was the real owner of the goods, and 13 tons out of the 50 had been delivered to the defendants and accepted by them at a time when there was strong evidence to show that they knew the plaintiff to be the real principal. The law was stated as follows (z):—

"In many such cases [*viz.* where the contract is wholly unperformed] such as for instance the case of contracts in which the skill or solvency of the person who is named as the principal may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal and sue in his own name; and perhaps it may be fairly urged that this, in all executory contracts, if wholly unperformed, or if partly performed without the knowledge of who is the real principal, may be the general rule."

But here part performance had been accepted by the defendants with full knowledge that the plaintiff was the real principal, and it was therefore considered that the plaintiff was entitled to recover.

Nor can
the pro-
fessed
agent be
sued on
the con-
tract.
Implied
warranty
of autho-
rity.

Next, as to the pretended agent's liability. It was at one time thought that an agent for a named principal who turned out to have no authority might be sued as a principal on the contract (a). But it has been determined that he is not liable on the contract itself (b). He is liable however on an implied warranty of his authority to bind his principal. This was decided in *Collen v.*

(y) (1846) 15 M. & W. 359, 16 L. J. Ex. 79.

(z) Per Cur. 15 M. & W. at p. 365; and see the remarks on

Bickerton v. Burrell, *ad fin.*

(a) Cp. Pothier, Obl. § 75.

(b) *Lewis v. Nicholson* (1852) 18 Q. B. 503, 21 L. J. Q. B. 311.

Wright (c), and has been followed in several later cases (d). In the rare case of a person purporting to contract as agent for a named principal, and at the same time expressly disclaiming any present authority, the implied warranty is excluded, for the other party does not rely on the existence of authority and is not misled, but is content to take the chance of ratification for what it may be worth (e). The pretended agent is also generally liable to an action in tort if he did not believe that he had authority (f). The liability on implied warranty is not affected by the supposed agent's good faith where he does so believe, and it has been suggested that the rule now applies even where a real authority has been determined, unknown to the agent, by the death of the principal (g).

β. The rules last stated are applicable only where the alleged principal was ascertained and existing at the time the contract was made, and might have been in fact principal.

β. Alleged principal who could not be responsible: professed agent treated as principal.

(c) (1857) 7 E. & B. 301, 26 L. J. Q. B. 147; in Ex. Ch. 8 E. & B. 617, 27 L. J. Q. B. 215.

(d) *Richardson v. Williamson* (1871) L. R. 6 Q. B. 276, 40 L. J. Q. B. 145; *Cherry v. Colonial Bank of Australasia* (1869) L. R. 3 P. C. 24, 31; *Oliver v. Bank of England* [1901] 1 Ch. 652, 70 L. J. Ch. 377. But the representation of the agent that he has authority must be a representation of matter of fact and not of law: *Beattie v. Lord Ebury* (1872) L. R. 7 Ch. 777, 7 H. L. 102, 41 L. J. Ch. 804, 44 *ib.* 20; *Weeks v. Propert* (1873) L. R. 8 C. P. 427, 437, 42 L. J. C. P. 129. And the rule cannot be applied to make a public servant acting on behalf of the Crown personally liable: *Dunn v. Macdonald* [1897] 1 Q. B. 555, 66 L. J. Q. B. 420, C.A. As to the measure of damages, *Simons v. Patchett* (1857) 7 E. & B. 568, 26 L. J. Q. B. 195; *Spedding v. Nevell* (1869) L. R. 4 C. P. 212, 38 L. J.

C. P. 133; *Godwin v. Francis* (1870) L. R. 5 C. P. 295, 39 L. J. C. P. 121; *Ex parte Pannure* (1883) 24 Ch. Div. 367.

(e) *Halbot v. Lens* [1901] 1 Ch. 344, 70 L. J. Ch. 125. It would seem arguable that in such a case there is nothing capable of ratification.

(f) *Randell v. Trimen* (1856) 18 C. B. 786, 25 L. J. C. P. 307. The object of establishing the liability *ex contractu* was to have a remedy against executors.

For a somewhat similar doctrine applied to the contract to marry, see *Millward v. Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2, and *Wild v. Harris* (1849) 7 C. B. 999, 18 L. J. C. P. 297. Here however there is not properly a warranty, for the promisor's undertaking that he is legally capable of marrying the promisee is a term in the principal contract itself. See Chap. VII. below, *ad fin.*

(g) *Halbot v. Lens*, note (e) above.

Here the doctrine of ratification is important. When a principal is named or described, but is not capable of authorizing the contract so as to be bound by it at the time, there can be no binding ratification: for "ratification must be by an existing person on whose behalf a contract might have been made at the time" (*h*).

There fall under this head contracts entered into by professed agents on behalf of wholly fictitious persons, or uncertain persons or sets of persons with whom no contract can be made by the description given, persons in existence but incapable of contracting, and lastly (which is in practice the most important case) proposed companies which have not yet acquired a legal existence (*i*). Now when a principal is named who might have authorized the contract, there is at the time of the contract a possibility of his being bound by subsequent ratification. But when the alleged principal could not have authorized the contract, then it is plain from the beginning that the contract can have no operation at all unless it binds the professed agent. It is construed accordingly *ut res magis valeat quam pereat*, and he is held to have contracted in person (*k*).

This principle has been carried so far that in a case where certain persons, churchwardens and overseers of a parish, covenanted "for themselves and for their successors, churchwardens and overseers of the parish," and there was

(*h*) Per Willes J. and Byles J. *Kelner v. Baxter* (1866) L. R. 2 C. P. 174, 185, 36 L. J. C. P. 94; *Scott v. Lord Ebury* (1867) L. R. 2 C. P. 255, 267, 36 L. J. C. P. 161. When ratification is admitted, the original contract is imputed by a fiction of law to the person ratifying; and the fiction is not allowed to be extended beyond the bounds of possibility. Perhaps there is no solid reason for the rule, but it is an established one.

(*i*) *Kelner v. Baxter* (1866) L. R. 2 C. P. 174, and authorities there referred to: *Scott v. Lord Ebury*

(1867) *ib.* 255; *Empress Engineering Co.* (1880) 16 Ch. Div. 125, overruling *Spiller v. Paris Skating Rink Co.* (1878) 7 Ch. D. 368. Companies have been held in equity to be bound by the agreements of their promoters, but on grounds independent of contract. Action upon such an agreement by the company, under the mistaken belief that it is binding, cannot be treated as evidence of a new agreement: *Re Northumberland Avenue Hotel Co.* (1886) 33 Ch. Div. 16, 54 L. T. 777.

(*k*) *Kelner v. Baxter* (1866) L. R. 2 C. P. at pp. 183, 185.

an express proviso that the covenant should not bind the covenantors personally, but was intended to bind the churchwardens and overseers of the parish for the time being as such churchwardens, &c., but not otherwise, it was held that since the funds of the parish could not be bound by the instrument in the manner intended, the effect of the proviso was to make no one liable on the covenant at all, and therefore the proviso was repugnant and void, and the covenantors were personally liable (*l*).

Accordingly the proper course for the other contracting party is to sue the agent as principal on the contract itself, and he need not resort to the doctrine of implied warranty (*m*). And as the agent can be sued, so it is apprehended that, in the absence of fraud, he might sue on the contract in his own name.

A slightly different case is where a man professes to contract as agent, but without naming his principal. He is then (as said above) *prima facie* personally liable in his character of agent. But even if the contract is so framed as to exclude that liability (and therefore any correlative right to sue), he is not precluded from showing that he himself is the principal and suing in that character. This was decided in *Schmaltz v. Avery* (*n*). The action was on a charter-party. The charter-party in terms stated that

When
professed
agent may
be his own
unnamed
principal.

(*l*) *Furnival v. Coombes* (1843) 5 M. & Gr. 736, 12 L. J. C. P. 265. But the doctrine of this case will certainly never be extended (see *Williams v. Hathaway* (1877) 6 Ch. D. 544); and *qu.* whether it would apply to an instrument not under seal. It is clearly competent to the parties to such an instrument to make its operation as a contract conditional on any event they please; and in such a case as this why may they not agree that nobody shall be bound if the principal cannot be? In *Kelner v. Baxter* oral evidence was offered that such was

the intention, but was rejected as contrary to the terms of the writing sued upon.

(*m*) *Kelner v. Baxter*, note (*k*), last page. Cp. *West London Commercial Bank v. Kitson* (1884) 12 Q. B. D. 157, where a bill was accepted by directors on behalf of a company which had no power to accept bills; the liability was put on the ground of deceit in 13 Q. B. Div. 360, 53 L. J. Q. B. 345.

(*n*) (1851) 16 Q. B. 655 (the statement of the facts is taken from the judgment of the Court, p. 658), 20 L. J. Q. B. 228.

it was made by Schmaltz & Co. (the plaintiffs) as agents for the freighters; it then stated the terms of the contract, and concluded in these words: "This charter being concluded on behalf of another party, it is agreed that all responsibility on the part of G. Schmaltz & Co. shall cease as soon as the cargo is shipped." This clause was not referred to in the declaration, nor was the character of the plaintiff as agent mentioned, but he was treated as principal in the contract. At the trial it was proved that the plaintiff was in point of fact the real freighter. Before the Court in banc the cases of *Bickerton v. Burrell* and *Rayner v. Grote* (*o*) were relied on for the defence, but it was pointed out that in those cases the agent named a principal on the faith of whose personal credit the other party might have meant to contract. Here "the names of the supposed freighters not being inserted, no inducement to enter into the contract from the supposed solvency of the freighters [could] be surmised. . . . The plaintiff might contract as agent for the freighter, whoever the freighter might turn out to be, and might still adopt that character of freighter himself if he chose" (*p*). And conversely, a man who has contracted in this form may nevertheless be sued on the contract as his own undisclosed principal, if the other party can show that he is in truth the principal, but not otherwise (*q*). In the same manner it is open to one of several persons with whom a contract was nominally made to show that he alone was the real principal, and to sue alone upon the contract accordingly (*r*).

(*o*) See pp. 106—108, above.

(*p*) In a later case in the Exchequer Chamber (*Sharman v. Brandt* (1871) L. R. 6 Q. B. 720, 40 L. J. Q. B. 312), there are some expressions not very consistent with this, but they were by no

means necessary for the decision. Moreover *Schmaltz v. Avery* was not cited.

(*q*) *Carr v. Jackson* (1852) 7 Ex. 382, 21 L. J. Ex. 137.

(*r*) *Spurr v. Cass* (1870) L. R. 5 Q. B. 656, 39 L. J. Q. B. 249.

II. ARTIFICIAL PERSONS.

In a complex state of civilization, such as that of the Roman Empire, or still more of the modern Western nations, it constantly happens that legal transactions have to be undertaken, rights acquired and exercised, and duties incurred by or on behalf of persons who are for the time being charged with offices of a public nature involving the tenure and administration of property for public purposes, or interested in carrying out a common enterprise or object. This enterprise or object may or may not be of a kind likely to be worked out within a definite time, and may or may not further involve purposes and interests of a public nature. The rights and duties thus created as against the world at large are wholly distinct from the rights and duties of the particular persons immediately concerned in the transactions. Those persons deal with interests beyond their own, though in many cases including or involving them, and it is not to their personal responsibility that third parties dealing with them are accustomed to look.

Artificial
persons:
their
nature.

This distinction (the substantial character of which it is important to bear in mind) is conveniently expressed in form by the Roman invention, adopted and largely developed in modern systems of law, of treating the collective persons who from time to time hold such a position—or, in some cases and according to some opinions, the property or office itself—as a single and continuous artificial person (s) or ideal subject of legal capacities and duties. It is possible to regard the artificial person as a kind of fictitious substance conceived as supporting legal attributes; and in fact this was, until lately, the prevailing theory of modern civilians on the Continent (t). But it is equally

(s) Fr. *corps* or *être moral*, *personne morale* (but this does not necessarily import capacity to sue or be sued in a corporate name); Germ. *juristische Person*; Ital. *ente morale*. Kent, Comm. 2. 268, uses

the term “moral person,” but it has not been generally adopted by English writers. Observe that the English term “artificial” is not the same as “fictitious.”

(t) See Prof. Maitland's Intro-

possible, and it seems not only more philosophical but more business-like, to hold that what we call the artificial identity of a corporation is within its own sphere and for its own purposes just as real as any other identity (*u*). The corporation becomes, within the limits assigned to its existence, "a body distinct from the members composing it, and having rights and obligations distinct from those of its members." This is often called a fiction: but it represents a class of facts not confined to legal usage or legal purposes. In the case of an ordinary partnership the firm is treated by mercantile usage as an artificial person, though not recognized as such by English law; and other voluntary and unincorporated associations are constantly treated as artificial persons in the language and transactions of every-day life. An even more remarkable instance is furnished by the artificial personality which is ascribed to the public journals by literary custom or etiquette, and is so familiar in writing and conversation that its curiosity most commonly escapes attention. The existence of these artificial persons by private convention, if we may so call them, shows that, if indeed there be any fiction in the matter, it is not superfluous or arbitrary (*w*).

Corpora-
tions in
the Com-
mon Law.

In the Common Law no speculative opinion on the subject has been definitely adopted (*x*), though it seems likely that only Coke's incapacity for grasping any general

duction to Gierke's *Political Theories of the Middle Age*, Cambridge 1900; further references there, at p. xxvi.

(*u*) In the United States a corporation duly created by the laws of any state is treated as a person dwelling in, and therefore a citizen of, that state within the meaning of the constitutional provision which enables the Federal courts to entertain suits between citizens of different states. See *Marshall v. Baltimore and Ohio Railr. Co.* (1853) 16 Howard, 314. On the

philosophy of legal personality cp. R. Wallaschek, *Studien zur Rechtsphilosophie*, Leipzig, 1889.

(*w*) "The orthodox doctrine of the common law, which recognizes only individuals and corporations as entities, undoubtedly lags far behind the ordinary conceptions of laymen": *Harv. Law Rev.* xv. 311.

(*x*) Hobbes gives an admirable exposition of the purely individualist view in the 16th chapter of his *Leviathan*, but of course without regard to authority.

theory, good or bad, saved us from what is now known as the "fiction theory" among Continental publicists (*y*).

In our authorities and practice the necessary marks of legal corporate existence are a recognized collective name (which however need not be expressly conferred at the outset), and capacity to sue, be sued, and do other acts in the law, in that name.

Perpetual succession, that is, the existence of a body independent of the natural life of any one or more members, and a common seal to authenticate the corporate acts, are consequences or incidents of incorporation rather than primary constituents. A corporation legally qualified to act as such can exist only with the sanction of the State, which may be expressed in England by a royal charter (*z*) or by statute. The statutory sanction may take the form—as in the familiar case of the Companies Acts—of authorizing persons who are so minded to constitute themselves into corporations by fulfilling specified general conditions. In this class of cases, at any rate, it would seem that the operative registration, or other appointed formality, is not properly considered as involving fiction of any kind, but is the official recognition and regulation of substantial matters of fact. With us the official sanction is a matter of procedure and public convenience. In the Roman law of the Empire it was an offence to form any kind of association without public authority; thus the early Christian churches were exposed to penalties by the mere fact of being *collegia illicita*. This principle has largely survived in the modern public law of the Continent; only the faintest signs of any attempt to imitate it occur in ours (*a*).

(*y*) The slight reference to Roman law in the *Sutton's Hospital case*, 10 Co. Rep. at fo. 29 *b*, shows that, if any theory had been formulated, it would have been the then received one of the civilians.

(*z*) The want of this has to be supplied in some cases by the fiction of a lost grant: Blackst. Comm. i.

473. See the whole chapter (Book 1, ch. 18) for a literary exposition of the Common Law doctrine as it stood in the latter part of the 18th century.

(*a*) It is said to be an offence to "assume to act as a corporation," but this is far short of the Roman prohibition.

The holders of ecclesiastical benefices and dignities are said, by an analogy which is of no great antiquity, to be "corporations sole." Little or no useful result seems to be attained, for the alleged corporate character of a parson does not prevent the freehold of the church from being in abeyance when he dies, though a grant to an existing parson and his successors is effectual. By a still more doubtful extension of the analogy, the Crown is said to be a corporation sole (*b*); and the same description has been applied by statute to the holders of a certain number of public offices (*c*). It may be sufficient to observe, so far as the principle is concerned, that for many centuries the Vatican and its contents—to say nothing of the spiritual powers and other former temporal possessions of the Holy See—have been held under an absolutely unique system of succession, but it has never occurred to any one to call the Pope a corporation sole. At any rate, the persons whom we have to call corporations sole in England can do very little in their corporate capacity, and in particular cannot bind or even benefit their official successors by contract, except in one or two peculiar cases (*d*). We therefore have nothing to learn in that quarter for the purposes of this work, and we may practically confine our attention to corporations aggregate.

We have to ascertain what contracts corporate bodies can make, and how they are to be made. The second of

(*b*) The theory of the King's "body politic" is given at some length in Plowd. 213. It would seem to have been a fashionable novelty at the time.

(*c*) See Prof. Maitland, *The Corporation Sole*, L. Q. R. xvi. 335; *The Crown as Corporation*, *ib.* xvii. 131. The notion of a corporation sole appears to date only from the 16th century.

(*d*) Generally "bishops, deans, parsons, vicars, and the like cannot take obligation to them and their successors, but it will go to the executors." *Arundel's case*, Hob.

64; 20 E. iv. 2, pl. 7; *Howley v. Knight* (1849) 14 Q. B. 240, 19 L. J. Q. B. 3. "Regularly no chattel can go in succession in a case of a sole corporation": Co. Litt. 46 *b*; it was otherwise in the case of the head of a religious house, as he could not make a will, Ro. Ab. 1. 515. See the old authorities summed up in Blackst. Comm. ii. 431—433, who attempts to find reasons. A curious recent case where a fund of stock was vested in certain rectors and their successors by a private Act is *Power v. Banks* [1901] 2 Ch. 487, 70 L. J. Ch. 700.

these questions is reserved for the following chapter on the Form of Contracts. The first cannot be adequately treated except in connexion with a wider view of the capacities, powers, and liabilities of corporations in general.

The capacities of corporations are limited

(i) By natural possibility, *i.e.*, by the fact that they are artificial and not natural persons :

(ii) By legal possibility, *i.e.*, by the restrictions which the power creating a corporation may impose on the legal existence and action of its creature.

Capacities
and lia-
bilities of
Corpora-
tion as
limited by
the nature
of an
artificial
person.

First, of the limits set to the powers and liabilities of corporations by the mere fact that they are not natural persons. The requirement of a common seal (of which elsewhere) is sometimes said to spring from the artificial nature of a corporation. The fact that it is not known in Scotland is however enough to show that it is a mere positive rule of English law. The correct and comprehensive proposition is that a corporation can do no executive act except by an agent; and a corporate seal is only one way of showing that the person entrusted with it is an authorized agent of the corporate body. We say that executive acts of a corporation must be done by an agent. It does not seem necessary or plausible to extend the proposition to deliberative acts and resolutions. When, for example, the assembled Fellows of a College resolve to grant a lease of certain college land, their resolution, whether unanimous or by the statutable majority, would seem to be the act not of agents but of the College itself. For if the Fellows voting are agents, who authorized them, and when? But when they proceed to order the affixing of the College seal to the lease, then the officer of the College who is directed to affix it is an appointed agent, whether he is himself a member of the governing body or not. There seem also to be cases in which the permanent authority of the head or other acting member

of a corporation is derived not from any authority specifically conferred on him, but from the original constitution of the corporation. Here, however, the conception of an implied agency is convenient and fairly applicable. Indeed, the Common Law doctrine of agency is so wide and flexible that we practically tend to regard all acts whatever done in the name of a corporation as derived from some authority, general or special, vested in the natural persons by whom they are done. This appears not to be a strictly correct view, but it has largely saved us from the speculative questions which have vexed Continental jurists ever since the thirteenth century, and probably also from much more serious errors.

A corporation obviously cannot be subjected to death, corporal punishment, or imprisonment, though it can be fined or made to pay damages as easily as a natural person. Further, it is understood that a corporation is incapable of committing the graver kinds of crime, such as treason, felony, perjury, or offences against the person (*e*), as well as of being punished for them. There can be no real authority to commit such acts. Any or all of the members or officers of a corporation who should commit acts of this kind (*e.g.*, should levy war against the King) under cover of the corporate name and authority would be individually liable to the ordinary consequences. "Offences, certainly offences of commission, are the offences of indi-

(*e*) *Reg. v. G. N. of Eng. Ry. Co.* (1846) 9 Q. B. 315, 326, 16 L. J. M. C. 16; nor, it is said, can it be excommunicated, for it has no soul: 10 Co. Rep. 32 *b*; the ultimate authority for this was a decree of Innocent IV. at the Council of Lyons in 1245; but otherwise as to interdict: Gierke, *Deutsche Genossenschaftsrecht*, iii. 348-9. So a corporation cannot do homage: Co. Litt. 66 *b*. Nor can it be subject to the jurisdiction of a customary court whose process is exclusively personal: *London Joint Stock Bank v. Mayor of London*

(1875) 1 C. P. D. 1, 45 L. J. C. P. 213, in C. A. chiefly on other grounds, 5 C. P. Div. 494; affirmed on this point in the House of Lords, 6 App. Ca. 393. We are not aware that any English writer has thought it necessary to state in terms that a corporation cannot be married or have any next of kin. The statement is to be found in Savigny, *Syst.* 3. 239; but is in part not quite so odd as it looks, as in Roman law *patria potestas* and all the family relations arising therefrom might be acquired by adoption.

viduals, not of corporations" (*f*). Nor can a corporation undertake duties which, though it might be strictly possible for a corporation to perform them by its officers or agents, are on the whole of a personal kind (*g*). On the other hand, it is subject to the same liabilities as any other employer for the acts, neglects, and defaults of its agents done in the course of their employment (*h*); and conversely it may sue in its corporate capacity for a libel reflecting on the management of its business (*i*). And the same principle is extended to make it generally subject to all liabilities incidental to its corporate existence and acts, though the remedy may be in form *ex delicto* or even criminal. Although it cannot commit a real crime, "it may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large," and may be indicted for a nuisance produced by the execution of its works or conduct of its business in an improper or unauthorized manner, as for obstructing a highway or navigable river (*k*). A corporation may even be liable by prescription, or by having accepted such an obligation in its charter, to repair highways, &c., and may be indictable for not doing it (*l*). A corporation carrying on business may likewise become liable to penalties imposed by any statute regulating that business, if it appears from the language or subject-matter of the statute that corporations were meant to be included (*m*). A steamship company has been

As to acts
of agents.

Indictable
in some
cases.

(*f*) Bramwell L.J. 5 Q. B. D. at p. 313. Cp. *Mayor of Manchester v. Williams* [1891] 1 Q. B. 94, 60 L. J. Q. B. 23.

(*g*) *Ex parte Swansea Friendly Society* (1879) 11 Ch. D. 768, 48 L. J. Ch. 577.

(*h*) Difficulties, formal and material, which used to be entertained on this head are now removed. Even malicious prosecution is not now thought to be an exception; see *Cornford v. Carlton Bank* [1900] 1 Q. B. 22, 68 L. J. Q. B. 1020, C. A. In the Middle Ages the possibility of a corporation committing a delict was disputed

by the canonists but generally maintained by the civilians: Gierke, *op. cit.* 402.

(*i*) *South Hetton Coal Co. v. N. E. News Assoc.* [1894] 1 Q. B. 133, 63 L. J. Q. B. 293, C. A.

(*k*) *Reg. v. G. N. of Eng. Ry. Co.* (1846) 9 Q. B. 315, per Cur. p. 326, 16 L. J. M. C. 16.

(*l*) See Grant on Corporations, 277, 283; Angell & Ames on Corporations, §§ 394-7; Wms. Saund. 1. 614, 2. 473.

(*m*) *Pharmaceutical Society v. London and Provincial Supply Association* (1880) 5 App. Ca. 857; see per Lord Blackburn at p. 869. A

held (on the terms of the particular statute, as it seems) to be not indictable under the Foreign Enlistment Act of Geo. 3, and therefore not entitled to refuse discovery which in the case of a natural person would have exposed him to penalties under the Act (*n*). As to the difficulty of imputing fraudulent intention to a corporation, which has been thought to be peculiarly great, it may be remarked that no one has ever doubted that a corporation may be relieved against fraud to the same extent as a natural person. There is exactly the same difficulty in supposing a corporation to be deceived as in supposing it to deceive, and it is equally necessary for the purpose of doing justice in both cases to impute to the corporation a certain mental condition—of intention to produce a belief in the one case, of belief produced in the other—which in fact can exist only in the individual mind of the member or servant of the corporate body who acts in the transaction (*o*). Lord Langdale found no difficulty in speaking of two railway companies as “guilty of fraud and collusion,” though not in an exact sense (*p*). However the members of a corporation cannot even by giving an express authority in the name of the corporation make it responsible, or escape from being individually responsible themselves, for a wrongful act which though not a personal wrong is such that if lawful it could not have been a corporate act (*q*). Such is a trespass in removing an obstruction of an alleged highway. For the right by which the act has to be justified is the personal right to use the highway, and a corporation as such cannot use

But cannot be bound by acts of even all its members when of a non-corporate character.

corporation cannot sue as a common informer without special statutory authority: *Guardians of St. Leonard's, Shoreditch v. Franklin* (1878) 3 C. P. D. 377.

(*n*) *King of Two Sicilies v. Wilcox* (1850) 1 Sim. N. S. 335, 19 L. J. Ch. 488.

(*o*) See per Lord Blackburn, 3 App. Ca. 1264. A company may “feel aggrieved,” Companies Act,

1880, 43 Vict. c. 19, s. 7, sub-s. 5.

(*p*) 12 Beav. 382.

(*q*) *Mill v. Hawker* (1874) L. R. 9 Ex. 309, 318, 44 L. J. Ex. 49; no judgment on this part of the case in Ex. Ch. L. R. 10 Ex. 92. It might be, by statute, the right or duty of a corporation to remove obstructions, and the real question here was whether a highway board had such a power or duty.

a highway. Likewise it is not competent to the governing body or the majority, or even to the whole of the members for the time being, of a corporation constituted by a formal act and having defined purposes, to appropriate any part of the corporate funds to their private use in a manner not distinctly warranted by the constitution; for it is not to be supposed that *all the members* of the corporation are equivalent to *the corporation* so that they can do as they please with corporate property. A corporation does not exist merely for the sake of the members for the time being. Lord Langdale held on this principle that the original members of a society incorporated by charter, who had bought up the shares of the society by agreement among themselves, were bound to account to the society for the full value of them (*r*). The fallacy of the assumption that a corporation has no rights as against its unanimous members is easily exposed by putting the extreme case of the members of a corporation being by accident reduced till there is only one left, who thereupon unanimously appropriates the whole corporate property to his own use (*s*).

The powers of a corporation are necessarily limited in some directions by the nature of things. There remains the question whether there are any general rules of law limiting them farther and otherwise. If our law had committed itself to the doctrine that the personality of a corporation is a mere fiction of the sovereign power, it might have been held as a natural consequence that a corporation could in no case have any powers except such as were conferred on it, expressly or by necessary implication, by the same act which created it. But this did not happen, and

Limita-
tion of
corporate
capacities
by posi-
tive rules.

(*r*) *Society of Practical Knowledge v. Abbott* (1840) 2 Beav. 559, 567, 50 R. R. 288, 294. Cp. Sav. Syst. 3. 283, 335. But it may be otherwise if the corporation has no definite constitution and no rules prescribing the application of its property.

Such cases are sometimes met with: *Brown v. Dale* (1878) 9 Ch. D. 78.

(*s*) Sav. Syst. 3. 329 *sqq.* §§ 97-99. The illustration in our text is given at p. 350, note, with the remark, "Hier ist gewiss Einstimmigkeit vorhanden."

the judicial discussion of the subject has been evoked by the rapid growth of incorporated commercial and industrial societies in modern times, and guided by reasons founded not in the nature of a corporation in itself, but in the need for safeguarding the interests partly of the individual members of companies, regarded as substantially partners in a joint undertaking, and partly of outside creditors dealing with companies, and looking to their corporate funds and credit, on the faith of apparently authorized acts and promises of their directors or agents. These two classes of interests are to some extent opposed, and the law has not reached the fairly settled condition in which it now stands without considerable fluctuations of opinion. On these, however, it is no longer needful to dwell at length.

“At common law a corporation created by the King’s charter has . . . the power to do with its property all such acts as an ordinary person can do, and to bind itself to such contracts as an ordinary person can bind himself to” (*t*), (subject to the corporate acts being sufficient in form, which we are not considering in this place). This rests on authority which, though it seems at times to have been forgotten, has never been disputed (*u*).

Powers of statutory corporations determined by purposes of incorporation.

But when a corporation is created directly by special statute, or indirectly by a statute authorizing the formation of a class of corporations on specified conditions, for purposes declared by the statute, or which the founders of the corporation are required to declare, then the question is different. As to powers expressly conferred on the corporation, or clearly authorized by general provisions, there can be no doubt; when farther powers are claimed, it must be considered what was the intention of the Legislature, and only such powers can be attributed to the

(*t*) Bowen L.J. in *Baroness Wenlock v. River Dee Co.* (1883) 36 Ch. D. 675, 685, *n*.

(*u*) *Sutton’s Hospital case*, 10 Co.

Rep., where it is said (at p. 30 *b*) that when a corporation is duly created, all other incidents are *tacite* annexed.

corporation as are necessary or reasonably incident to the fulfilment of the purposes for which it is established. Members of the company have the right to rely on those purposes not being exceeded; the public can ascertain them, and have not any right to hold the company liable for undertakings outside them. On the whole, "where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited" (x)—prohibited in the sense not that penalties or disabilities follow on such an act if done, but that the attempt to do it can from the first have no kind of validity as a corporate act.

The reasons for this rule, as we have hinted, are derived (1) from the law of partnership: (2) from principles of public policy.

Reasons
for the
limitation
derived—

1. In trading corporations the relation of the members or shareholders to one another is in fact a modified (y) contract of partnership, which in the view of courts of equity is governed by the ordinary rules of partnership law so far as they are not excluded by the constitution of the company.

1. From
partner-
ship law.

Now it is a well-settled principle of partnership law that no majority of the partners can bind a dissenting minority, or even one dissenting partner, to engage the firm in transactions beyond its original scope. In the case, therefore, of a corporation whose members are as between themselves partners in the business carried on by the corporation, any

Rights of
dissenting
partners.

(x) Lord Blackburn in *A. G. v. G. E. Ry. Co.* (1880) 5 App. Ca. 473, 481, stating the effect of *Ashbury Ry. Carriage and Iron Co. v. Riche* (1875) L. R. 7 H. L. 653, 44 L. J. Ex. 185, a leading case on the Companies Act, 1862, but not confined to the construction of that Act. See *Baroness Wenlock v. River*

Dec Co. (1885) 10 App. Ca. 354, 360, 54 L. J. Q. B. 577.

(y) Namely by provisions for transfer of shares, limited liability of shareholders, and other things which cannot (at least with convenience or completeness) be made incident to a partnership at common law.

Doctrine
as to
limited
agency.

In public
companies
limits of
directors'
authority
presumed
to be
known.

dissenting member is entitled to restrain the governing body or the majority of the company from attempting to involve the company in an undertaking which does not come within its purposes as defined by its original constitution. Courts of equity have been naturally called upon to look at the subject chiefly from this point of view, that is, as giving rise to questions between shareholders and directors, or between minorities and majorities. Such questions do not require the court to decide whether an act which dissentients may prevent the agents of the company from doing in its name might not nevertheless, if so done by them with apparent authority, be binding on the corporate body, or a contract so made be enforceable by the other party who had contracted in good faith. This distinction was not always kept in sight. But further, according to the law of partnership a partner can bind the firm only as its agent: his authority is *prima facie* an extensive one (z), but if it is specially restricted by agreement between the partners, and the restriction is known to the person dealing with him, he cannot bind the firm to anything beyond those special limits. Limits of this kind may be imposed on the directors or other officers of a company by its constitution; and if that constitution is embodied in a special Act of Parliament, or in a deed of settlement or articles of association registered in a public office under the provisions of a general Act, it is considered that all persons dealing with the agents of the corporation must be deemed to have notice of the limits thus publicly set to their authority. The corporation is accordingly not bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined. And it is important to remember that in this view the resolutions of meetings however numerous,

(z) James L.J. *Baird's case* (1870) L. R. 5 Ch. 733; Story on Agency, §§ 124, 125, adopted by the Judicial Committee in *Bank of Australasia*

v. Breillat (1847) 6 Moo. P. C. 152, 195; Partnership Act, 1890, ss. 5—8.

and passed by however great a majority, have of themselves no more power than the proceedings of individual agents to bind the partnership against the will of any single member to transactions of a kind to which he did not by the contract of partnership agree that it might be bound.

Irregularities in the conduct of the internal affairs of the body corporate, even the omission of things which as between shareholders and directors are conditions precedent to the exercise of the directors' authority, will not however invalidate acts which on the face of them are regular and authorized: third parties dealing in good faith are entitled to assume that internal regulations (the observance of which it may be difficult or impossible for them to verify) have in fact been complied with.

But it is to be observed that in the ordinary law of partnership there is nothing to prevent the members of a firm, if they are all so minded, from extending or changing its business without limit by their unanimous agreement. As a matter of pure corporation law, the unanimity of the members is of little importance: it may supply the want of a formal act of the governing body in some cases (a), but it can in no case do more. As a matter of mixed corporation and partnership law this unanimity may be all-important as being a ratification by all the partners of that which if any one of them dissented would not be the act of the firm: for although the corporate body of which they are members is in many respects different from any ordinary partnership, it is treated, and justly treated, as a partnership for this purpose. It appears, then, that the unanimous assent of the members will remove all objections founded on the principles of partnership, and will so far

Assent of all the members will remove objections on this head.

(a) Even this is in strictness hardly consistent with the principle that if A, B, C. . . . &c., are incorporated to them and

their successors by the name of X, then $A + B + C + \dots \&c.$ are *not* = X.

leave the corporation in full possession of its common law powers. There are nevertheless many transactions which even the unanimous will of all the members cannot make binding as corporate acts. For the reasons which determine this we must seek farther.

2. Public policy : powers must not be used to defeat special purposes of incorporation.

2. Most corporations established in modern times by special Acts of Parliament have been established expressly for special purposes the fulfilment of which is considered to be for the benefit of the public as well as of the proprietors of the undertaking, and for this reason they are armed with extraordinary powers and privileges. Whatever a corporation may be capable of doing at common law, there is no doubt that unusual powers given by the Legislature for a special purpose must be employed only for that purpose : if Parliament empowers either natural persons or a corporation to take J. S.'s lands for a railway, J. S. is not bound to let them take it for a factory or to let them take an excessive quantity of land on purpose to re-sell it at a profit (*b*). If Parliament confers immunity for the obstruction of a navigable river by building a bridge at a specified place, that will be no excuse for obstructing it in the like manner elsewhere. Moreover we cannot stop here. It is impossible to say that an incorporation for

(*b*) See *Galloway v. Mayor of London* (1866) L. R. 1 H. L. at p. 43, 35 L. J. Ch. 477 ; *Lord Carington v. Wycombe Ry. Co.* (1868) L. R. 3 Ch. 377, 381, 37 L. J. Ch. 213. Nor may a company hold regattas or let out pleasure-boats to the inconvenience of the former owner on a piece of water acquired by them under their Act for a reservoir : *Bostock v. N. Staffordshire Ry. Co.* (1856) 3 Sm. & G. 283, 292, 25 L. J. Ch. 325 ; nor alienate land similarly acquired except for purposes authorized by the Act : *Mulliner v. Midland Ry. Co.* (1879) 11 Ch. D. 611, 622, 48 L. J. Ch. 258.

But a statutory corporation acquiring property takes it with all its rights and incidents as against strangers, subject only to the duty of exercising those rights in good faith with a view to the objects of incorporation : *Swindon Waterworks Co. v. Wilts and Berks Canal Navigation Co.* (1875) L. R. 7 H. L. 697, 704, 710, 45 L. J. Ch. 638 ; *Bonner v. G. W. Ry. Co.* (1883) 24 Ch. Div. 1 ; and a corporation cannot bind itself not to use in the future special powers which have presumably been conferred to be used for the public good : *Ayr Harbour Trustees v. Oswald* (1883) 8 App. Ca. 623.

special objects and with special powers gives a restricted right of using those powers, but leaves the use of ordinary corporate powers without any restriction. The possession of extraordinary powers puts the corporation for almost all purposes and in almost all transactions in a wholly different position from that which it would have held without them; and apart from the actual exercise of them it may do many things which it was otherwise legally competent to do, but which without their existence it could practically never have done. Any substantial departure from the purposes contemplated by the Legislature, whether involving on the face of it a misapplication of special powers or not, would defeat the expectations and objects with which those powers were given. When Parliament, in the public interest and in consideration of a presumed benefit to the public, confers extraordinary powers, it must be taken in the same interest to forbid the doing of that which will tend to defeat its policy in conferring them; and to forbid in the sense not only of attaching penal consequences to such acts when done, but of making them wholly void if it is attempted to do them. Accordingly contracts of railway companies and corporations of a like public nature which can be seen to import a substantial contravention of the policy of the incorporating Acts are held by the courts to be void, and are often spoken of as *mala prohibita*, and illegal in the same sense that a contract of a natural person to do anything contrary to the provisions of an Act of Parliament is illegal (c). Others prefer to say that the Legislature, acting indeed on motives of public policy, has simply disabled the corporation from doing acts of this class; "to regard the case as one of incapacity to contract

(c) Blackburn J. in *Taylor v. Chichester & Midhurst Ry. Co.* (1867) L. R. 2 Ex. at p. 379, 39 L. J. Ex. 217; and (Brett and Grove JJ. concurring) in *Riche v. Ashbury Ry.*

Carriage Co. (1874) L. R. 9 Ex. at pp. 262, 266, 43 L. J. Ex. 177. Lord Hatherley, s. c. nom. *Ashbury Ry. Carriage Co. v. Riche* (1875) L. R. 7 H. L. at p. 689.

rather than of illegality, and the corporation as if it were non-existent for the purpose of such contracts" (*d*). This appears the sounder, and is now the more generally accepted view (*e*).

Interest of
the public
as in-
vestors.

There is another consideration of a somewhat similar kind which applies equally to what may be called public companies in a special sense—*i.e.*, such as are invested with special powers for carrying out defined objects of public interest—and ordinary joint-stock companies which have no such powers. The provisions for limited liability and for the easy transfer of shares in both sorts of companies must be considered, in their modern form and extent at least, as a statutory privilege. These provisions also invest the companies with a certain public character and interest apart from the nature of their particular objects in each case, but derived from the fact that they do professedly exist for particular objects. By far the greater part of their capital represents the money of shareholders who have bought shares in the market without any intention of taking an active part in the management of the concern, but on the faith that they know in what sort of adventure they are investing their money, and that the company's funds are not being and will not be applied to other objects than those set forth in its constitution as declared by the act of incorporation, memorandum of association, or the like. This is not a mere repetition of the objections

Buyers of
shares in
market
and
persons
giving
credit to
the com-
pany have
a right to
assume
that the
company's
professed
objects are
adhered
to.

(*d*) Archibald J., L. R. 9 Ex. 293; Lord Cairns, L. R. 7 H. L. at p. 672; Lord Selborne, *ib.* 694. And Bramwell L.J. rather strongly disapproved of calling such acts illegal, pointing out that if they were properly so called there would have been some means of restraining them in a court of common law at the instance of the Crown: *A. G. v. G. E. Ry. Co.* (1880) 11 Ch. Div. at pp. 501—3.

(*e*) The agreement of a third person to procure a company to do something foreign to its proper purposes is plausibly called illegal: *MacGregor v. Dover & Deal Ry. Co.* (1852) 18 Q. B. 618, 22 L. J. Q. B. 69; and see per Erle J. in *Mayor of Norwich v. Norfolk Ry. Co.* (1855) 4 E. & B. 397, 24 L. J. Q. B. 105; but it is really void as being the promise of a performance impossible in law (Ch. VIII., below).

grounded on partnership law; the incoming shareholder may protect himself for the future, but the mischief may be done or doing at the time of the purchase: moreover persons other than shareholders deal with the company on the faith of its adhering to its defined objects. They are entitled to "know that they are dealing with persons who can only devote their means to a given class of objects, and who are prohibited from devoting their means to any other purpose" (g). The assent of all those who are shareholders at a given time will bind them individually, but it will not bind others (h). If I buy shares in a company which professes to make railway plant in England I have a right to assume that its funds are not pledged to pay for making a railway in Spain or Belgium, and it is the same if dealing with it as a stranger I lend money or otherwise give credit to it. Accordingly the provisions of the Companies Act, 1862, are to be considered as having been enacted in the interests of "in the first place, those who might become shareholders in succession to the persons who were shareholders for the time being; and secondly, the outside public, and more particularly those who might be creditors of companies of this kind" (i). Accordingly it is settled that a company registered under the Companies Act is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association (k).

It is not within our scope to discuss the particular contracts which particular corporate bodies have been held incapable of making. One class of contracts, however, is in a somewhat peculiar position in this respect, and

Inability of corporations to make negotiable instruments.

(g) Lord Hatherley, L. R. 7 H. L. at p. 684.

(h) See L. R. 9 Ex. 270, 291.

(i) Lord Cairns, L. R. 7 H. L. at p. 667.

(k) *Ashbury Ry. Carriage & Iron*

Co. v. Riche (1875) L. R. 7 H. L. 653, 44 L. J. Ex. 185. See note D. in Appendix for some further account of the authorities by which the rules were settled in the latter part of the nineteenth century.

requires a little separate consideration. We mean the contracts expressed in negotiable instruments and governed by the law merchant. As a general rule a corporation cannot bind itself by a negotiable instrument (*l*). This is not because a corporation cannot be presumed to have power to do so, but, in the first place, because of the general rule of form that the contracts of a corporation must be made under its common seal (*m*). It follows from this that a corporation cannot *prima facie* be bound by negotiable instruments in the ordinary form. The only comparatively early authority which is really much to the point was argued and partly decided on this footing (*n*). But the corporate seal may now take the place of signature in bills and notes (*o*), and transferable debentures under a company's seal have been held to be negotiable (*p*). Thus the objection of form does not seem of great importance in modern practice. The question of authority to bind the company in substance is more serious. It may be asked, why should not the agents who are authorized to contract on behalf of a company in the ordinary course of its business be competent to bind the company by their acceptance or indorsement on its behalf, just as a member of an ordinary trading partnership can bind the firm? There is a twofold answer. First, the extensive implied authority of

The ordinary rules of partnership agency not applicable.

(*l*) A different rule prevails in the United States, where it is held that a corporation not expressly prohibited from so doing may give negotiable promissory notes for any of the legitimate purposes of its incorporation. This appears more convenient at the present day.

(*m*) See more as to this in the following chapter.

(*n*) *Broughton v. Manchester Waterworks Co.* (1819) 3 B. & Ald. 1, 22 R. R. 278. The chief point was on the statutes giving the Bank of England exclusive rights of issuing notes, &c., within certain limits. In *Murray v. E. India Co.*

(1821) 5 B. & Ald. 204, 24 R. R. 325, the statutory authority to issue bills was not disputed; a difficulty was raised as to the proper remedy, but disposed of in the course of argument: 5 B. & Ald. 210; 24 R. R. 330. Other cases at first sight like these relate to the authority of particular agents to bind a corporate—or unincorporated—association irrespective of the theory of corporate liabilities. See note (*q*) next page.

(*o*) Bills of Exchange Act, 1882, s. 91.

(*p*) *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 987.

an ordinary partner to bind his fellows cannot be applied to the case of a numerous association, whether incorporated or not, whose members are personally unknown to each other, and it has been often decided that the managers of such associations cannot bind the individual members or the corporate body, as the case may be, by giving negotiable instruments in the name of the concern, unless the terms of their particular authority enable them to do so by express words or necessary implication (*q*). In the case of a corporation this authority must be sought in its constitution as set forth in its special Act, articles of association, or the like. Secondly, the power of even a trading corporation to contract without seal is limited to things incidental to the usual conduct of its business. But as was pointed out by a judge who was certainly not disposed to take a narrow view of corporate powers, a negotiable instrument is not merely evidence of a contract, but creates a new contract and a distinct cause of action, and "it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad;" and it would be most inconvenient if one had in the case of a corporation to inquire "whether the consideration in respect of which the acceptance is given is sufficiently connected with the purposes for which the acceptors are incorporated" (*r*).

And partly in the peculiar character of the contract of exchange.

(*q*) As to unincorporated joint stock companies: *Neale v. Turton* (1827) 4 Bing. 149, 29 R. R. 531; *Dickinson v. Valpy* (1829) 10 B. & C. 128, 34 R. R. 348; *Bramah v. Roberts* (1837) 3 Bing. N. C. 963; *Bull v. Morrel* (1840) 12 A. & E. 745; *Brown v. Byers* (1847) 16 M. & W. 252, 16 L. J. Ex. 112. As to incorporated companies: *Steele v. Harmer* (1845) 14 M. & W. 831 (in Ex. Ch. 4 Ex. 1, not on this point); *Thompson v. Universal Salvage Co.* (1848) 1 Ex. 694, 17 L. J. Ex. 118; *Re Peruvian Rys. Co.* (1867) L. R. 2 Ch. 617, 36 L. J. Ch. 864;

cp. *Ex parte City Bank* (1868) L. R. 3 Ch. 758, per Selwyn L.J. The two last cases go rather far in the direction of implying such a power from general words.

(*r*) Per Erle C.J. *Bateman v. Mid Wales Ry. Co.* (1866) L. R. 1 C. P. 499, 509, 35 L. J. C. P. 205. Railway companies are expressly forbidden to issue negotiable or assignable instruments without statutory authority, on pain of forfeiting the nominal amount of the security: 7 & 8 Vict. c. 85, s. 19.

The result seems to be that in England a corporation can be bound by negotiable instruments only in the following cases :—

1. When the negotiation of bills and notes is itself one of the purposes for which the corporation exists—"within the very scope and object of their incorporation" (s)—as with the Bank of England and the East India Company, and (it is presumed) financial companies generally, and perhaps even all companies whose business wholly or chiefly consists in buying and selling (s).

2. When the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf, either by express words or by necessary implication.

The extent of these exceptions cannot be said to be very precisely defined, and in framing articles of association and similar instruments, it is therefore desirable to insert express and clear provisions on this head.

American
decisions.

In the United States the Supreme Court has decided that local authorities having the usual powers of administration and local taxation have not any implied power to issue negotiable securities which will be indisputable in the hands of a *bona fide* holder for value (t), and has been equally divided on the question whether municipal corporations have such power (u). It seems however that in American Courts a power to borrow money is held to carry with it as an incident the power of issuing negotiable securities (x).

Estoppel
and part
perform-

The common law doctrine of estoppel (y), and the kindred equitable doctrine of part performance (z), apply to corpo-

(s) Per Montague Smith J. L. R. 1 C. P. 512; *Ex parte City Bank* (1868) L. R. 3 Ch. 758.

(t) *Police Jury v. Britton* (1872) 15 Wallace, 566, 572.

(u) *The Mayor v. Ray* (1873) 19 Wallace, 466.

(x) *Police Jury v. Britton*, 15 Wallace, 566.

(y) *Webb v. Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

(z) *Wilson v. West Hartlepool Ry. Co.* (1864-5) 2 D. J. S. 475, 493, per

rations as well as to natural persons. Even when the corporate seal has been improperly affixed to a document by a person who has the custody of the seal for other purposes, the corporation may be bound by conduct on the part of its governing body which amounts to an estoppel or ratification, but it will not be bound by anything less (a). The principles applied in such cases are independent of contract, and therefore no difficulty arises from the want of a contract under the corporate seal, or non-compliance with statutory forms. But it is conceived that no sort of estoppel, part performance, or ratification can bind a corporation to a transaction which the Legislature has in substance forbidden it to undertake, or made it incapable of undertaking.

ance apply
to corpora-
tions.

Turner L.J. 34 L. J. Ch. 241; *Crook v. Corporation of Seaford* (1871) L. R. 6 Ch. 551; *Melbourne Banking Corporation v. Brougham* (1878-9) 4 App. Ca. at p. 169, 48 L. J. C. P. 12. This must be confined however to cases where the corporation is "capable of being bound by the written contract of its directors as an individual is

capable of being bound by his own contract in writing:" per Cotton L.J. *Hunt v. Wimbledon Local Board* (1878) 4 C. P. Div. at p. 62, 48 L. J. C. P. 207.

(a) *Bank of Ireland v. Evans' Charities* (1855) 5 H. L. C. 389; *Merchants of the Staple v. Bank of England* (1887) 21 Q. B. Div. 160, 57 L. J. Q. B. 418.

CHAPTER III.

FORM OF CONTRACT.

I. *Formality in Early English Law.*

Modern
principles:
form
required
only for
special
reasons.

THE law of contract exists chiefly for the security of men in their daily business, conducted in many different modes from hour to hour, and in whatever mode suits the circumstances, by word of mouth (nowadays including telephone), written agreement, letter, or telegraph. Hardly any limit can be set to the diversity of forms in which men bargain with one another; but business, in the commercial sense, has this common feature in all its branches, that it depends on bargain of some kind. Therefore the Common Law does not, as a general rule, require any particular form in contracts, provided that there is a bargain intended to be binding, though in certain cases evidence in writing is required for special reasons of precaution, or by mercantile custom embodied in the law, and in some cases formalities are imposed for the protection of the revenue. Transactions of bounty, on the other hand, are not in the ordinary way of business, and if a man wants to bind himself without bargain, or to dispense with proof of a bargain, he must do so with a certain amount of solemnity (reduced, however, to a matter of no great trouble or necessary cost in modern practice) by expressing his promise in a deed. Accordingly agreements made for valuable consideration are subject to conditions of form only by way of exception in particular cases, but solemn form is necessary to make a gratuitous promise binding. In some such words as the foregoing the broad principles of our modern law, and the

reasons which make us fairly content with it as it stands, may be stated with tolerable accuracy. But such a statement would be misleading if taken as implying the assertion that the law came to be what it is by any such logical process. English law started from a groundwork of archaic Germanic ideas not unlike those of the early Roman law, and quite unrelated to the common sense of a modern man of business. Form and ceremony were everything, substance and intention were nothing or almost nothing. Only those transactions were recognized as having legal efficacy which fulfilled certain conditions of form, and could be established by one or other of certain rigidly defined modes of proof. The proof itself was formal and, when once duly made, conclusive. The history of this branch of our law, through the Middle Ages and even later, consists of the transition from the ancient to the modern way of thinking.

Otherwise
in early
law.

Taking English courts and the remedies they administered as they were about the middle of the thirteenth century (for it is needless to go farther back for our present purpose) (*a*), we find that what we should call elaborate contracts or covenants, and of sufficiently varied kinds, can be annexed to grants of land and interests in land, but there is very little independent law of contract, and, if by a law of contract we mean a law which enforces promises as such, it can hardly be said that there is any at all. Still less is there any theory or system of the law. Those who aim at having one must go to the now rising Continental science of Roman law, and gather crumbs from the tables of the renowned glossators. Bracton, so far as he has a system, copies Azo of Bologna with variations due partly to misunderstanding and partly to the impossibility of contradicting the actual English practice (*b*). But the

No systematic
rules of
contract.

(*a*) There was practically no secular law of contract before the Norman Conquest. See Pollock and Maitland, *Hist. Eng. Law*, i. 57, 2nd ed.; "English Law before the

Norman Conquest," by the present writer, *L. Q. R.* xiv. 291, 303.

(*b*) See Prof. F. W. Maitland's "Bracton and Azo," *Selden Society*, 1895.

only classification for which the practical English lawyer cares is a classification of forms of action, process, and remedies. Bracton was largely read and used, and was more or less closely followed by the unknown authors of the books called Britton and Fleta, but his Roman or Romanized arrangements of legal topics never acquired any authority, and produced no effect whatever on the registers of writs or on the technical vocabulary of pleaders. English lawyers would not believe—and on the whole were right in not believing—that an English charter had anything to do with the Roman rules about the verbal contract by stipulation, or an appeal of felony with an action under the Lex Aquilia (*c*).

Archaic
modes of
proof.

The only modes of proof known to early Germanic law were oath and ordeal. The archaic oath is not a confirmation of testimony open to discussion, but a one-sided oath of the party and his helpers, which may be preliminary, for the purpose of giving him a standing before the Court, or final and decisive. One regular form of deciding issues on the Continent, but not in England until it was introduced from Normandy, was trial by battle, not material in the history of this part of the law, but still theoretically possible in an action of debt as late as the time of Henry II. (*d*). Ordeal, abolished in the thirteenth century, was confined to criminal matters. Proof by writing is ultimately of Roman origin, but was adopted by the Germanic nations of the Continent at an early time. Duel and writing are the two normal modes of proof in the King's Court in the twelfth century (*e*). The charter or deed of medieval English law was not a continuation of the Anglo-Saxon "book," but a Norman importation, representing the Frankish branch of what we may call Roman conveyancing tradition (*f*). Now the old Roman formal contract, the stipulation by question

(*c*) "Actio legis Aquiliæ de hominibus per feloniam occisis vel vulneratis": Bracton, fo. 103 *b*.

(*d*) Glanv. x. 12.

(*e*) *Ib.* x. 17.

(*f*) The English charter of feoffment and memorandum of livery of seisin are really the *carta* and *notitia* familiar in Continental practice as early as the ninth century.

and answer, had been practically transformed into a written contract even before the legislation of Justinian (*g*); and *stipulatio* or *adstipulatio* had long since, in Continental conveyancing, become a name for the signing or execution of a written instrument (*h*).

Thus the charter came to us with all the historical dignity of the most solemn form of obligation known to Roman law (*i*); and if this was not enough, its authority was completed by the fact that all proof was formal in Germanic law, and was conclusive when once made in due form. "Proof was what satisfied the law, not what satisfied the Court" (*k*). A deed was, and, subject to grounds of exception admitted only at a later time, still is binding, not because it records this or that kind of transaction, but by the form of the record itself. And, when a promise to pay money was recorded in a deed, the action which the promisee could bring was not an action on the promise.

The remedy to recover money secured by deed was the action of debt, which retained its essential form and characters through the whole history of common law procedure, so long as the forms of action were preserved at all. This was a writ of right for chattels, an action, not to enforce a promise, but to get something conceived as already belonging to the plaintiff: it was called an action of property as late as the Restoration (*l*), a conception which lingers even in some of Blackstone's language. A promise, where it was operative at all, operated not by way

Remedies
in 13th
century.
Debt on
covenant.

(*g*) Brunner, *Zur Rechtsgesch. der römischen und germanischen Urkunde*, 63; Moyle's *Justinian*, 2nd ed. 498.

(*h*) Brunner, *Röm. u. Germ. Urkunde*, 220 *sqq.* For an English example, see *Kemble*, C. D. No. 623.

(*i*) The summary view of the Roman classification of contracts formerly given in this chapter was written at a time when English text-books on Roman law were few and trustworthy ones fewer. It is

now, perhaps, needless, but is preserved in the Appendix (Note E) in case it may be sometimes useful for immediate reference.

(*k*) Salmond, *Essays in Jurisprudence*, &c., p. 16.

(*l*) The action of *assumpsit* was said by Vaughan C.J. to be "much inferior and ignobler than the action of debt, which by the Register is an action of Property": *Edgcomb v. Dee*, *Vaugh.* at p. 101.

Debt on
simple
contract,
detinue,
&c.

of obligation, but as a grant of the sum expressed (*m*). It was a good defence that the party's seal had been lost and affixed by a stranger without his knowledge, at least if the owner had given public notice of the loss (*n*): but not if it had been misapplied by a person in whose custody it was; for then, it was said, it was his own fault for not having it in better keeping. An action of debt (*o*) might also be brought, without proof by deed, for such things as money lent, or the price of goods sold and delivered, and an action of detinue (which was but a species of debt) for chattels bailed (*p*), the cause of action being still not any promise by the defendant but his possession of the plaintiff's money (so it was conceived) or goods. The first thing needful to found the action of debt was, as it still is in jurisdictions where the old forms of action persist, that a certain sum of money should be payable by the defendant to the plaintiff. In debt and detinue the text-writers could profess to recognize the Roman *contractus innominati* (*do ut des*, &c.) which Bracton, carrying out the medieval notion that a promise to pay or deliver is a grant immediate in execution and only suspended in operation, put under the head, strange to us nowadays, of conditional grants (*q*). In the course of the next two centuries we

(*m*) Harv. Law Rev. vi. 399; "contracts of debt are reciprocal grants," *Edgcomb v. Dee*, last note.

(*n*) Glanvill (L. 10, c. 12) has not even this: Britton, l. 164, 166, as in the text. "Pur ceo qe il ad conu le fet estre soen en partie, soit agardé pur le pleyntif et se purveye autre foiz le defendaunt de meillour gardeyn." Cp. Fleta, l. 6, c. 33, § 2; c. 34, § 4. That the practice of publishing formal notice in case of loss really existed is shown by the example given in Blount's Law Dictionary, s. v. *Sigillum*, dated 18 Ric. II. In modern law such questions, when they occur, come under the head of estoppel.

(*o*) For fuller statement see

Pollock & Maitland, Hist. Eng. L. ii. 210.

(*p*) For the precise difference in the developed forms of pleading see per Maule J. 15 C. B. 303. The decision of the C. A. in *Bryant v. Herbert* (1878) 3 C. P. Div. 389, 47 L. J. C. P. 670, that an action for wrongful detention is "founded on tort" within the meaning of the County Court Acts is, and professes to be, beside the historical question.

(*q*) Bracton 18 *b*, 19 *a*; Fleta l. 2, c. 60, § 23. In Bracton fo. 19 *a*, lines 14, 15 in ed. 1569, *si* (the second), *possunt* and *ut repetere possim* are corrupt. The true readings, conjecturally restored long ago by Güterbock, and in fact given almost identically by the best MSS., are *sed . . . possum . . . non ut repetere possim*.

find it quite clear that an action of debt, provided the sum be liquidated, will lie (as we should now say) on any consideration executed, and also that on a contract for the sale of either goods or land an action may be maintained for the price before the goods are delivered or seisin given of the land (*r*). In 1294 debt was brought to recover money paid on a failure of consideration and the action was held good in form (though there was in fact a covenant) (*s*), and it was said that money paid as the price of land might be recovered back in debt if the seller would not enfeoff the buyer.

Other remedies applicable to contracts were of limited scope and utility. The action of covenant, of which we do not hear before the thirteenth century, was grounded on agreement, *conventio*, both in form and in fact, but it was practically confined to agreements relating to interests in land. Attempts at extending it were cut short by the establishment, after some vacillation, of the rule that writing under seal was the only admissible proof; so that in the modern common law covenant is the proper name of a promise made by deed. The writ of covenant remained a solitary and barren form of action, without influence on the later development of the law (*t*).

The action of account (*u*) was a remedy of wider application (sometimes exclusively, sometimes concurrently with debt) to enforce claims of the kind which in modern times have been the subject of actions of assumpsit for money had and received or the like. It covered apparently all

(*r*) Y. B. 12 Ed. III. (Rolls ed.) 587 [A.D. 1338]; Mich. 37 H. VI. [A.D. 1459], 8, pl. 18, by Prisot C.J., where it is added that in the case of goods sold, though not of land, the buyer may take the goods: this follows from the theory of "reciprocal grant."

(*s*) Y. B. 21 & 22 Ed. I. 600.

(*t*) See Pollock & Maitland, ii. 216, Harv. Law Rev. vi. 399-401.

The Statutum Walliae [A.D. 1284] is the most instructive document. The suggestion in Blackstone, Comm. iii. 158, that Assumpsit is an action on the case analogous to the writ of covenant, is quite unhistorical, though ingenious.

(*u*) 52 Hen. III. (Stat. Marl.) c. 17, 13 Ed. I. (Stat. Westm. 2) c. 23. For more history and details see Mr. Langdell in Harvard Law Rev. ii. 243, 251.

sorts of cases where money had been paid on condition or to be dealt with in some way prescribed by the person paying it (*x*). One must not be misled by the statement that "no man shall be charged in account but as guardian in socage, bailiff or receiver" (*y*): for it is also said "a man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver: for if a man receive money for my use I shall have an account against him as receiver; or if a man deliver money unto another to deliver over unto me, I shall have an account against him as my receiver" (*z*). This action might be brought by one partner against another (*a*). At common law it could not be brought by executors, except, it seems, in the case of merchants, nor against them unless at the suit of the Crown (*b*): but it was made applicable both for and against executors by various statutes to which it is needless to refer particularly (*c*). In modern times this action was obsolete except as between tenants in common (*d*). Like the action of debt, it was in the nature of a writ of right, and founded not on a promise, but on the duty—in this case not of paying a sum certain but of rendering an account—attached by law to the defendant's receipt of the plaintiff's money.

On informal executory agreements there was in general no remedy in the King's Courts (*e*). The Ecclesiastical Courts however enforced them freely in suits *pro laesione fidei*, within (and sometimes, it would seem, not within) (*f*) the limits set by the Constitutions of Clarendon, and defined

(*x*) See cases in 1 Rol. Abr. 116.

(*y*) 11 Co. Rep. 89, Co. Lit. 172 *a*.

(*z*) F. N. B. 116 Q.

(*a*) *Ib.* 117 D. Mr. Langdell disputes this, but Fitzherbert is clear and express on the point.

(*b*) Co. Lit. 90 *b*, and see *Earl of Devonshire's case*, 11 Rep. 89.

(*c*) The action is given against executors by 4 & 5 Ann. c. 3 (Rev.

Stat.; 4 Ann. c. 16 in Ruffhead) s. 27.

(*d*) See Lindley on Partnership, 547, note *o*.

(*e*) See further Ames, "Parol Contracts prior to Assumpsit," Harv. Law Rev. viii. 252.

(*f*) Harv. Law Rev. vi. 403; Pollock & Maitland, H. E. L. ii. 200. Neither the authority nor the actual text of *Circumspecte agatis* is certain.

later by the ordinance or so-called statute of *Circumspecte agatis*. Executory mercantile contracts were also recognized in the special courts which administered the law merchant. But we cannot here attempt to throw any light on that which Lord Blackburn found to be one of the obscurest passages in the history of the English law (*g*). Also there were exceptions by local custom. "In London a man shall have a writ of covenant without a deed for the covenant broken," and there was a like custom in Bristol (*h*).

When no remedy at common law.

II. *The Action of Assumpsit.*

In the later middle ages a general remedy became indispensable; but it was introduced from a different branch of the law, and by a device which at first was thought too bold to succeed. This was a new variety of action on the case, framed, it seems, as often on the writ of deceit (*i*) as on that of trespass, and it ultimately became the familiar action of assumpsit and the ordinary way of enforcing simple contracts. Failure to perform one's agreements did not create a debt (*k*), but it was found to be a wrong in the nature of deceit for which there must be a remedy in damages. The final prevalence of assumpsit over debt, like that of trover over detinue (*l*), was much aided by the defendant not being able to wage his law and by the

Later introduction of assumpsit.

(*g*) Blackburn on the Contract of Sale, 207-208. In addition to the quotation there from the Year Book of Ed. IV., see Y. B. 21 & 22 Ed. I., p. 458. And see Master Macdonell's introduction to Smith's Mercantile Law, 10th ed. 1890; A. T. Carter, The Early History of the Law Merchant in England, L. Q. R. xvii. 232.

(*h*) F. N. B. 146a, Liber Albus 191a, 14 H. IV. 26a, pl. 33, Godb. 49, 336, Sty. 145, 198, 199, 228, Latch. 134, 1 Leo. 2, 4 Leo. 105. Unless indeed we really have here rules of the law merchant which were pleaded as local customs as

the only way of getting them recognized by the King's Courts.

(*i*) "The breach of promise is alleged to be mixed with fraud and deceit to the special prejudice of the plaintiff, and for that reason it is called trespass on the case": *Pinchon's case*, 9 Co. Rep. 89a.

(*k*) "No man hath property by a breach of promise, but must be repaired in damages": Vaughan C.J. in *Edgcomb v. Dee*, Vaughan at p. 101.

(*l*) See per Martin B. *Burroughes v. Bayne* (1860) 5 H. & N. at p. 301, 29 L. J. Ex. 188.

greater simplicity and latitude of the pleadings: but the reason of its original introduction was to supply a remedy where no other action would lie. This was not effected without dispute and dissent. In the first recorded case (*m*), the action was against a carpenter for having failed to build certain houses as he had contracted to do. The writ ran thus: "Quare cum idem [the defendant] ad quasdam domos ipsius Laurentii [the plaintiff] bene et fideliter infra certum tempus de novo construend' apud Grimesby assumpsisset, praedictus tamen T. domos ipsius L. infra tempus praedictum, &c., construere non curavit ad dampnum ipsius Laurentii decem libr', &c." The report proceeds to this effect:—

"*Tirwit.*—Sir, you see well that his count is on a covenant, and he shows no such thing: judgment.

Gascoigne.—Seeing that you answer nothing, we ask judgment and pray for our damages.

Tirwit.—This is covenant or nothing (*ceo est merement un covenant*).

Brenchesley J.—It is so: perhaps it would have been otherwise had it been averred that the work was begun and then by negligence left unfinished.

(*Hankford J.* observed that an action on the Statute of Labourers might meet the case.)

Rickhill J.—For that you have counted on a covenant and show none, take nothing by your writ but be in mercy."

The word *fideliter* in the writ is significant. It seems to denote a deliberate competition with the jurisdiction of the Courts Christian in matters of *fidei laesio*. We will show you, the pleader says in effect, that the King's

(*m*) Mich. 2 H. IV., 3 *b*, pl. 9. The full and careful historical discussion of the whole subject by Prof. Ames of Harvard in Harv. Law Rev. ii. 1, 53, supersedes all previous researches. Actions of trespass on the case had previously

been allowed for malfeasance by the negligent performance of contracts (for which it is still held that there is an alternative remedy in contract and in tort), but an action for mere non-feasance was a novelty.

judges too know what belongs to good faith, and will not let breach of faith go without a remedy. It may also have been intended to show that there was a bargain and mutual trust (*n*).

This adverse decision was followed by at least one like it (*o*), but early in the reign of Henry VI. an action was brought against one Watkins for failure to build a mill within the time for which he had promised it, and two out of three judges (Babington C.J. and Cockaine J.) were decidedly in favour of the action being maintainable and called on the defendant's counsel to plead over to the merits (*p*). Martin J. dissented, insisting that an action of trespass would not lie for a mere non-feasance: a difficulty by no means frivolous in itself. "If this action is to be maintained on this matter," he said, "one shall have an action of trespass on every agreement that is broken in the world." This however was the very thing sought, and so it came to pass in the two following reigns, when the general application of the action of assumpsit was well established. But only in 1596 was it conclusively decided that assumpsit was admissible at the plaintiff's choice where debt would also lie (*q*). The fiction of the action being founded on a tort was abolished by the Common Law Procedure Act.

Meanwhile the relation between the parties which was assumed as the foundation of the duty violated by the defendant, and which involved the plaintiff's having in some way changed his position for the worse on the faith of the defendant's undertaking, was transformed into the modern doctrine of Consideration, coalescing on the way,

(*n*) Modern pleading would require, of course, a much more distinct averment of consideration: but the doctrine was not yet formed.

(*o*) Mich. 11 H. IV. 33, pl. 60. And see Bigelow L.C. on Torts, 587.

(*p*) Hil. 3 H. VI. 36, pl. 33.

(*q*) *Slade's case*, 4 Co. Rep. 91 *a*, in Ex. Ch. It was still later before it was admitted that the substantial cause of action in assumpsit was the contract. O. W. Holmes, *The Common Law*, 284-287. For the earlier history see Prof. Ames, *Harvard Law Rev.* ii. 16.

in fact if not in strict theory, with the existing requirements of the actions of debt and account. Of this we shall speak separately.

Rule that deeds may not be written on wood, &c.

It is stated in several books of authority (*e.g.* Shepp. Touchst. 54) that a deed must be written on parchment or paper, not on wood, &c. This seems to refer to the then common use of wooden tallies as records of contracts. Fitzherbert in fact says (*r*) that if such a tally is sealed and delivered by the party it will not be a deed; and the Year Books afford evidence of attempts to rely on sealed tallies as equivalent to deeds; and it appears that by the custom of London they were so (*s*). These tallies were no doubt written upon as well as notched, so that nothing could be laid hold of to refuse them the description of deeds but the fact of their being wooden: the writing is expressly mentioned in one case (*t*), and the Exchequer tallies used till within recent times were likewise written upon (*u*).

III. *Modern requirements of form.*

Requirements of form now

We have seen how in the ancient view no contract was good (as indeed no act in the law was) unless it brought

(*r*) F. N. B. 122 I.

(*s*) "Un taille de dette enseale par usage de la citee est auxi fort come une obligacoun": Liber Albus 191 a.

(*t*) Trin. 12 H. IV. 23, pl. 3. The other citations we have been able to verify are Pasch. 25 Ed. III. 83 (wrongly referred to as 40 in the last case and in the margin of Fitzh.), pl. 9, where the reporter notes it is said to be otherwise in London; and Trin. 44 Ed. III. 21, pl. 23.

(*u*) See account of them in Penny Cyclopædia, s. v. Tally; Hall, Antiquities of the Exchequer, 118 *sqq.* The French (art. 1333) and Italian (art. 1332) Civil Codes expressly admit tallies as

evidence between traders who keep their accounts in this way; nor is the use of them unknown at this day in England. By the courtesy of Mr. J. B. Matthews, of the Middle Temple, formerly of Worcester, I have a specimen of the tallies with which the hop-pickers in Herefordshire still keep account of the quantities picked. They were used in the Kentish hop country within living memory, and in Hampshire not many years ago. I have seen them, in a rougher form, in use in a village baker's shop in Normandy. Specimens of English tallies both ancient and recent may be seen in the medieval room of the British Museum, and at the Record Office. Cp. Col. Yule's note on Marco Polo, ii. 78, 2nd ed.

itself within some favoured class by satisfying particular conditions of form, or of evidence, or both. The modern view to which the law of England has now long come round is the reverse, namely that no contract need be in any particular form unless it belongs to some class in which a particular form is specially required.

treated as
the excep-
tion.

Before we say anything of these classes it must be mentioned that contracts under seal are not the only formal contracts known to English law. There are certain so-called "contracts of record" which are of a yet higher nature than contracts by deed. The judgment of a Court of Record is treated for some purposes as a contract: and a recognizance, *i. e.* "a writing obligatory acknowledged before a judge or other officer having authority for that purpose and enrolled in a Court of Record," is strictly and properly a contract entered into with the Crown in its judicial capacity. The statutory forms of security known as statutes merchant, statutes staple, and recognizances in the nature of a statute staple, were likewise of record, but they have long since fallen out of use (*x*).

Contracts
of Record.

The kinds of contract subject to restrictions of form are these:

- (1). At common law, the contracts of corporations. The rule that such contracts must in general be under seal is earlier than the time when the modern doctrine of contracts was formed. Of late years great encroachments have been made upon it, which have probably not reached their final limits; the law is still unsettled on some points, and demands careful consideration. Both the historical and the practical reason lead us to give this topic the first place.

Contracts
subject to
special
forms.

(*x*) As to Contracts of Record, see Anson, p. 55, 9th ed., and for an account of statutes merchant, &c. 2 Wms. Saund. 216-222.

- (2). Partly by the law merchant (now codified in England) and partly by statute, the peculiar contracts expressed in negotiable instruments.
- (3). By statute only—
- A. The various contracts within the Statute of Frauds. Certain sales and dispositions of property are regulated by other statutes, but mostly as transfers of ownership or of rights good against third persons rather than as agreements between the parties.
 - B. Marine insurances.
 - C. Transfer of shares in companies (generally).
 - D. Acknowledgment of debts barred by the Statute of Limitation of James I.
 - E. Marriage: This, although we do not mean to enter on the subject of the Marriage Acts, must be mentioned here to complete the list.

1. *As to contracts of corporations.*

Corporations.

Old rule: Seal generally required.

The doctrine of the common law was that corporations could bind themselves only under their common seal, except in small matters of daily occurrence, as the appointment of household servants and the like (*y*). The principle of these exceptions being, in the words of the Court of Exchequer Chamber, "convenience amounting almost to necessity" (*z*), the vast increase in the extent, importance, and variety of corporate dealings which has taken place in modern times has led to a corresponding increase of the exceptions. Before considering these, however, it is well

(*y*) 1 Wms. Saund. 615, 616, and see old authorities collected in notes to *Arnold v. Mayor of Poole* (1842) 4 M. & Gr. 860, 12 L. J. C. P. 97; and *Fishmongers' Company*

v. Robertson (1843) 5 M. & Gr. 131, 12 L. J. C. P. 185.

(*z*) *Church v. Imperial Gas Light Company* (1838) 6 A. & E. 846, 861, 45 R. R. 638, 643.

to cite an approved judicial statement of the rule, and of the reasons that may be given for it:—

“The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Everyone becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act; and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerous attended, is, after all, not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing: either a seal or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of a whole body corporate, is a necessity inherent in the very nature of a corporation” (a).

It is, no doubt, a matter of “inherent necessity” that when a natural person acts for a corporation, his authority must be shown in some way; and the common seal in the agent’s custody, when an act in the law purports to be the act of the corporation itself, or his authority under seal, when it purports to be the act of an agent for the corporation, is in English law the recognized evidence for that purpose. But there is no reason in the nature of things why his authority should not be manifested in other ways: nor is the seal of itself conclusive, for an instrument to which it is in fact affixed without authority is not binding on the corporation (b). On the other hand, although it is usual and desirable for the deed of a corporation to be sealed with its proper corporate seal, it is laid down by

(a) *Mayor of Ludlow v. Charlton* (1840) 6 M. & W. 815, 823, adopted by Pollock B. in *Mayor of Kidderminster v. Hardwick* (1873) L. R. 9 Ex. at p. 24, 43 L. J. Ex. 9; and see per Keating J. *Austin v. Guar-*

dians of Bethnal Green (1874) L. R. 9 C. P. at p. 95, 43 L. J. C. P. 100.

(b) *Bank of Ireland v. Evans’ Charities* (1855) 5 H. L. C. 389.

high authorities that any seal will do (*c*). A company under the Companies Act, 1862, must have its name engraved in legible characters on its seal, and any director, &c., using as the seal of the company any seal on which the name is not so engraved is subject to a penalty of 50*l*. (ss. 41, 42) : but this would not, it is conceived, prevent instruments so executed from binding the company (*d*). The seal of a building society incorporated under the Building Societies Act, 1874 (37 & 38 Vict. c. 42, s. 16, sub-s. 10), "shall in all cases bear the registered name thereof," but no penalty or other consequence is annexed to the non-observance of this direction.

Modern
excep-
tions.
Bank of
Columbia
*v. Patter-
son*
(Supreme
Court,
U. S.).

We now turn to the exceptions. According to the modern authorities it is now established, though not till after sundry conflicting decisions, that the "principle of convenience amounting almost to necessity" will cover all contracts which can fairly be treated as necessary and incidental to the purposes for which the corporation exists : and that in the case of a trading corporation all contracts made in the ordinary course of its business or for purposes connected therewith fall within this description. The same or even a wider conclusion was much earlier arrived at in the United States. As long ago as 1813 the law was thus stated by the Supreme Court :—

"It would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution all

(*c*) 10 Co. Rep. 30 *b*, Shepp. Touchst. 57. Yet the rule is doubted, Grant on Corp. 59, but only on the ground of convenience and without any authority. The like rule as to sealing by an individual is quite clear and at least as old as Bracton: Non multum refert utrum [carta] proprio vel alieno sigillo sit signata, cum semel a donatore coram testibus ad hoc vocatis recognita et concessa fuerit, fo. 38 *a*. Cp. Britton, l. 257.

(*d*) Notwithstanding the statutory penalty, there is a reported instance of the private seal of a

director being used when the company had been so recently formed that there had been no time to make a proper seal, *Gray v. Lewis* (1869) L. R. 8 Eq. at p. 531. The like direction and penalty are contained in the Industrial and Provident Societies Act, 1893, s. 66 (repeating an earlier enactment). As to execution of deeds abroad by companies under the Acts of 1862 and 1867, see the Companies Act, 1862, s. 55, and the Companies Seals Act, 1864 (27 & 28 Vict. c. 19) ; in Scotland, the Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94), s. 56.

parole contracts made by its authorized agents are express promises of the corporation, and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie" (e).

In England this rule still holds good only for trading corporations, and perhaps also for non-trading corporations established in modern times for special purposes. The former conflict of decisions is much reduced, but there remains the inconvenient distinction of two if not three different rules for corporations of different kinds.

Not so wide in England.

As concerns trading corporations the law may be taken as settled by the unanimous decisions of the Court of Common Pleas and of the Exchequer Chamber in *South of Ireland Colliery Co. v. Waddle* (f). The action was brought by the company against an engineer for non-delivery of pumping machinery, there being no contract under seal. Bovill C.J. said in the Court below that it was impossible to reconcile all the decisions on the subject: but the exceptions created by the recent cases were too firmly established to be questioned by the earlier decisions, which if inconsistent with them must be held not to be law:—

Trading corporations: Contracts in course of business do not want seal. S. of Ireland Colliery Co. v. Waddle.

"These exceptions apply to all contracts by trading corporations entered into for the purposes for which they are incorporated. A company can only carry on business by agents,—managers and others; and if the contracts made by these persons are contracts which relate to objects and purposes of the company, and are not inconsistent with the rules and regulations which govern their acts (g), they are valid and binding upon the company, though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of

(e) *Bank of Columbia v. Patterson* (1813) 7 Cranch, 299, 306. It is also held by the American authorities that the appointment by a corporation of an agent, officer, or attorney need not be under seal.

(f) (1868) L. R. 3 C. P. 463, in Ex. Ch. 4 C. P. 617, 38 L. J. C. P.

338. Most if not all of the previous authorities are there referred to.

(g) This qualification is itself subject to the rule established by *Royal British Bank v. Turquand* (1856) 6 E. & B. 237, 25 L. J. Q. B. 317, and similar cases, and mentioned at p. 126 above. For details see Note D. in Appendix.

frequent occurrence and small importance. The authorities, however, do not sustain the argument."

Cases
overruled,
semble.

The decision was affirmed on appeal without hearing counsel for the plaintiffs, and Cockburn C.J. said the defendant was inviting the Court to reintroduce a relic of barbarous antiquity. It is submitted that the following cases must since this be considered as overruled:—

East London Waterworks v. Bailey (1827) 4 Bing. 283. Action for non-delivery of iron pipes ordered for the company's works (*h*). Expressly said in the Court below to be no longer law, per Montague Smith J. See L. R. 3 C. P. 475.

Homersham v. Wolverhampton Waterworks Co. (1851) 6 Ex. 137, 20 L. J. Ex. 193. Contract under seal for erection of machinery: price of extra work done with approval of the company's engineer and accepted, but not within the terms of the sealed contract, held not recoverable.

Diggle v. London & Blackwall Ry. Co. (1850) 5 Ex. 442, 19 L. J. Ex. 308. Work done on railway in alterations of permanent way, &c.: this case already much doubted in *Henderson v. Australian Royal Mail, &c. Co.* 5 E. & B. 409, 24 L. J. Q. B. 322, which is now confirmed in its full extent by the principal case.

Probably *Finlay v. Bristol & Exeter Ry. Co.* (1852) 7 Ex. 409, 21 L. J. Ex. 117, where it was held that against a corporation tenancy could in no case be inferred from payment of rent so as to admit of an action for use and occupation without actual occupation.

Also *London Dock Co. v. Sinnott* (1857) 8 E. & B. 347, 27 L. J. Q. B. 129, where a contract for scavenging the company's docks for a year was held to require the seal, as not being of a mercantile nature nor with a customer of the company, can now be of little or no authority beyond its own special circumstances: see per Bovill C.J. L. R. 3 C. P. 471.

Even in the House of Lords it has been assumed and said, though fortunately not decided, that a formal contract under seal made with a railway company cannot be subsequently varied by any informal mutual consent: *Midland G. W. Ry. Co. of Ireland v. Johnson* (1858) 6 H. L. C. 798, 812.

Cases
affirmed.

The following cases are affirmed or not contradicted. Some of them were decided at the time on narrower or

(*h*) The directors were authorized by the incorporating Act of Parliament to make contracts; but it was

held that this only meant they might affix the seal without calling a meeting.

more particular grounds, and in one or two the trading character of the corporation seems immaterial:—

Beverley v. Lincoln Gas Co. (1837) 6 A. & E. 829; 45 R. R. 626. Action against the company for price of gas meters supplied.

Church v. Imperial Gas Co. (1838) 6 A. & E. 846, 45 R. R. 638 in Ex. Ch. Action by the company for breach of contract to accept gas. A supposed distinction between the liability of corporations on executed and on executory contracts was exploded.

Copper Miners of England v. Fox (1851) 16 Q. B. 229, 20 L. J. Q. B. 174. Action (in effect) for non-acceptance of iron rails ordered from the company. The company had in fact for many years given up copper mining and traded in iron, but this was not within the scope of its incorporation.

Lowe v. L. & N. W. Ry. Co. (1852) 18 Q. B. 632, 21 L. J. Q. B. 361. The company was held liable in an action for use and occupation when there had been an actual occupation for corporate purposes, partly on the ground that a parol contract for the occupation was within the statutory powers of the directors and might be presumed: cp. the next case.

Pauling v. L. & N. W. Ry. Co. (1853) 8 Ex. 867, 23 L. J. Ex. 105. Sleepers supplied to an order from the engineer's office and accepted: there was no doubt that the contract could under the Companies Clauses Consolidation Act be made by the directors without seal, and it was held that the acceptance and use were evidence of an actual contract.

Henderson v. Australian Royal Mail Co. (1855) 5 E. & B. 409, 24 L. J. Q. B. 322. Action on agreement to pay for bringing home one of the company's ships from Sydney. Here it was distinctly laid down that "where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created" such contracts need not be under seal (by Wightman J.): "The question is whether the contract in its nature is directly connected with the purpose of the incorporation" (by Erle J.).

Australian Royal Mail Co. v. Marzetti (1855) 11 Ex. 228, 24 L. J. Ex. 273. Action by the company on agreement to supply provisions for its passenger ships.

Reuter v. Electric Telegraph Co. (1856) 6 E. & B. 341, 26 L. J. Q. B. 46: where the chief point was as to the ratification by the directors of a contract made originally with the chairman alone, who certainly had no authority to make it.

Ebbw Vale Company's case (1869) L. R. 8 Eq. 14, decides that one who sells to a company goods of the kind used in its business need not ascertain that the company means so to use them, and is not prevented from enforcing the contract even if he had notice of an intention to use them otherwise.

As concerns non-trading corporations, the question has never been decided by a Court of Appeal. But the weight Non-trading

corpora-
tions.
“Neces-
sary and
inciden-
tal” con-
tracts.

of authority seems on the whole to warrant the statement that all contracts necessary and incidental to the purposes for which the corporation exists may be made without seal, at least when the corporation has been established for special purposes by a modern statute or charter. On the rule as thus limited the latest case is *Nicholson v. Bradfield Union* (i), where it was held that a corporation is liable without a contract under seal for goods of a kind which must be from time to time required for corporate purposes, at all events when they have been actually supplied and accepted. Earlier decisions are as follows:—

Sanders v. St. Neots Union (1846) 8 Q. B. 810, 15 L. J. M. C. 104. Iron gates for workhouse supplied to order without seal and accepted.

Paine v. Strand Union (1846) *ib.* 326, 15 L. J. M. C. 89, is really the same way, though at first sight *contra*: the decision being on the ground that making a plan for rating purposes of *one parish* within the union was not incidental to the purposes for which the guardians of the *union* were incorporated: they had nothing to do with either making or collecting rates in the several parishes, nor had they power to act as a corporation in matters confined to any particular parish.

Clarke v. Cuckfield Union (1852) 21 L. J. Q. B. 349 (in the Bail Court, by Wightman J.). Builders' work done in the workhouse. The former cases are reviewed.

Haigh v. North Bierley Union (1858) E. B. & E. 873, 28 L. J. Q. B. 62. An accountant employed to investigate the accounts of the union was held entitled to recover for his work as “incidental and necessary to the purposes for which the corporation was created,” by Erle J., Crompton J. doubting.

In direct opposition to the foregoing we have only one decision, but a considered one, *Lamprell v. Billericay Union* (1849) 3 Ex. 283, 18 L. J. Ex. 282. Building contract under seal, providing for extra works on written directions of the architect. Extra work done and accepted, but without such direction. Held, with an expression of regret, that against an individual this might have given a good distinct cause of action on simple contract, but this would not help the plaintiff, as the defendants could be bound only by deed.

Hunt v. Wimbledon Local Board (1878) 4 C. P. Div. 48, 48 L. J. C. P. 207. Whether the preparation of plans for new offices for an incorporated local board, which plans were not acted on, is work incidental and necessary to the purposes of the board, *quære*. The actual decision was on the ground that contracts above the value of 50*l.* were imperatively required by statute to be under seal.

(i) (1866) L. R. 1 Q. B. 620, 35 L. J. Q. B. 176.

With regard to municipal corporations (and it is presumed other corporations not created for definite public purposes) the ancient rule seems to be still in force to a great extent. An action will not lie for work done on local improvements (*k*), or on an agreement for the purchase of tolls by auction (*l*), or for the grant of a lease of corporate property (*m*), without an agreement under seal. Where a municipal corporation owns a graving dock, a contract to let a ship have the use of it need not be under the corporate seal; but this was said to fall within the ancient exception of convenience resting on the frequency or urgency of the transaction. The admission of a ship into the dock is a matter of frequent and ordinary occurrence and sometimes of urgency (*n*).

Municipal Corporations, &c. Old rule in force, *semble*.

There has also been little disposition to relax the rule in the case of appointments to offices, and it seems at present that such an appointment, if the office is of any importance, must be under the corporate seal to give the holder a right of action for his salary or other remuneration. This appears by the following instances:—

Appointments to offices by corporations.

Appointment of attorney: *Arnold v. Mayor of Poole* (1842) 4 M. & Gr. 860, 12 L. J. C. P. 97. It is true that the Corporation of London appoints an attorney in court without deed, but that is because it is a matter of record: see 4 M. & Gr. pp. 882, 896. But after an attorney has appeared and acted for a corporation the corporation cannot, *as against the other party to the action*, dispute his authority on this ground: *Faviell v. E. C. Ry. Co.* (1848) 2 Ex. 344, 17 L. J. Ex. 223, 297. Nor can the other party dispute it after taking steps in the action: *Thames Haven, &c. Co. v. Hall* (1843) 5 M. & Gr. 274. Cp. *Reg. v. Justices of Cumberland* (1848) 17 L. J. Q. B. 102.

Grant of military pension by the East India Company in its political capacity: *Gibson v. E. I. Co.* (1839) 5 Bing. N. C. 262, 50 R. R. 688.

Increase of town clerk's salary in lieu of compensation: *Reg. v. Mayor of Stamford* (1844) 6 Q. B. 434.

(*k*) *Mayor of Ludlow v. Charlton* (1840) 6 M. & W. 815.

(*l*) *Mayor of Kidderminster v. Hardwick* (1873) L. R. 9 Ex. 13, 43 L. J. Ex. 9.

(*m*) *Mayor of Oxford v. Crow*

[1893] 3 Ch. 535, where the corporation sought to enforce the agreement.

(*n*) *Wells v. Kingston-upon-Hull* (1875) L. R. 10 C. P. 402, 44 L. J. C. P. 257.

Office with profit annexed (coal meter paid by dues) though held at the pleasure of the corporation: *Smith v. Cartwright* (1851) 6 Ex. 927, 20 L. J. Ex. 401. (The action was not against the corporation, but against the person by whom the dues were alleged to be payable. The claim was also wrong on another ground.)

Collector of poor rates: *Smart v. West Ham Union* (1855) 10 Ex. 867, 24 L. J. Ex. 201; but partly on the ground that the guardians had not undertaken to pay at all, the salary being charged on the rates; and wholly on that ground in Ex. Ch., 11 Ex. 867, 25 L. J. Ex. 210.

Clerk to master of workhouse: *Austin v. Guardians of Bethnal Green* (1874) L. R. 9 C. P. 91, 43 L. J. C. P. 100.

Dunston v. Imperial Gas Light Co. (1832) 3 B. & Ad. 125, 37 R. R. 352, as to directors' fees voted by a meeting; but chiefly on the ground that the fees were never intended to be more than a gratuity.

Cope v. Thames Haven, &c. Co. (1849) 3 Ex. 841, 18 L. J. Ex. 345: agent appointed for a special negotiation with another company not allowed to recover for his work, the contract not being under seal nor in the statutory form, viz., signed by three directors in pursuance of a resolution, although by another section of the special Act the directors had full power to "appoint and displace . . . all such managers, officers, agents . . . as they shall think proper." It seems difficult to support the decision; this was not like an appointment to a continuing office; and cp. *Reg. v. Justices of Cumberland* (1848) 17 L. J. Q. B. 102, where under very similar enabling words an appointment of an attorney by directors without seal was held good as against third parties.

No equity to enforce informal agreement against corporation.

It has been decided (as indeed it is obvious in principle) that inability to enforce an agreement with a corporation at law by reason of its not being under the corporate seal does not create any jurisdiction to enforce it in equity (o).

Right of corporations to sue on contracts executed.

The rights of corporations to sue upon contracts are somewhat more extensive than their liabilities. When the corporation has performed its own part of the contract so that the other party has had the benefit of it, the corporation may sue on the contract though not originally bound (p). For this reason, if possession is given under a

(o) *Kirk v. Bromley Union* (1846) 2 Ph. 640; *Crompton v. Varna Ry. Co.* (1872) L. R. 7 Ch. 562, 41 L. J. Ch. 817.

(p) *Fishmongers' Co. v. Robertson* (1843) 5 M. & Gr. 131, 12 L. J. C. P. 185. The judgment on this point

is at pp. 192-6; but the dictum contained in the passage "Even if . . . against themselves," pp. 192-3 (extending the right to sue without limit) is now overruled. See *Mayor of Kidderminster v. Hardwick* (1873) L. R. 9 Ex. 13, 21, 43 L. J. Ex. 9.

demise from a corporation which is invalid for want of the corporate seal, and rent paid and accepted, this will constitute a good yearly tenancy (*q*) and will enable the corporation to enforce any term of the agreement which is applicable to such a tenancy (*r*), and a tenant who has occupied and enjoyed corporate lands without any deed may be sued for use and occupation (*s*). Conversely the presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord: "where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made" (*t*). And a person by whose permission a corporation has occupied lands may sue the corporation for use and occupation (*u*). In the case of a yearly tenancy the presumption is of an actual contract, but the liability for use and occupation is rather *quasi ex contractu* (*x*). It is settled that in general a cause of action on a quasi-contract is as good against a corporation as against a natural person. Thus a corporation may be sued in an action for money received on the ground of strict necessity; "it cannot be expected that a corporation should put their seal to a

Tenancy and occupation.

Corporations liable on quasi-contracts generally.

(*q*) *Wood v. Tate* (1806) 2 Bos. & P. N. R. 247, 9 R. R. 645.

(*r*) *Eccles. Commrs. v. Merral* (1869) L. R. 4 Ex. 162, 38 L. J. Ex. 93. By Kelly C.B. this is correlative to the tenant's right to enforce the agreement in equity on the ground of part performance, *sed qu.*

(*s*) *Mayor of Stafford v. Till* (1827) 4 Bing. 75, 29 R. R. 511. The like as to tolls, *Mayor of Carmarthen v. Lewis* (1834) 6 C. & P. 608, but see Serj. Manning's note, 2 M. & Gr. 249.

(*t*) *Doe d. Pennington v. Tanier* (1848) 12 Q. B. 998, 1013, 18 L. J. Q. B. 49.

(*u*) *Lowe v. L. & N. W. Ry. Co.* (1852) 18 Q. B. 632, 21 L. J. Q. B. 361.

(*x*) The liability existed at common law, and the statute 11 Geo. 2, c. 19, s. 14, made the remedy by action on the case co-extensive with that by action of debt, see *Gibson v. Kirk* (1841) 1 Q. B. 850, 10 L. J. Q. B. 297. Since the C. L. P. Act the statute seems in fact superfluous.

promise to return moneys which they are wrongfully receiving" (*y*). It was held much earlier that trover could be maintained against a corporation—a decision which, as pointed out in the case last cited, was analogous in principle though not in form (*z*). Sometimes it is stated as a general rule that corporations are liable on informal contracts of which they have in fact had the benefit: but the extent and existence of the supposed rule are doubtful (*a*).

Statutory
forms of
contract.

Forms of contracting otherwise than under seal are provided by many special or general Acts of Parliament creating or regulating corporate companies, and contracts duly made in those forms are of course valid. But a statute may, on the other hand, contain restrictive provisions as to the form of corporate contracts, and in that case they must be strictly followed. Enactments requiring contracts of local corporate authorities exceeding a certain value to be in writing and sealed with the corporate seal are held to be imperative, even if the agreement has been executed and the corporation has had the full benefit of it (*b*). The general result seems to stand thus:—

Summary
of results.

In the absence of enabling or restrictive statutory provisions, which when they exist must be carefully attended to—

A trading corporation may make without seal any con-

(*y*) *Hall v. Mayor of Swansea* (1844) 5 Q. B. 526, 549, 13 L. J. Q. B. 107. The like of a quasi corporation empowered to sue and be sued by an officer, *Jefferys v. Gurr* (1831) 2 B. & Ad. 833, 36 R. R. 769.

(*z*) *Yarborough v. Bank of England* (1812) 16 East, 6, 14 R. R. 272. See early cases of trespass against corporations cited by Lord Ellenborough, 16 East, at p. 10, 14 R. R. 275, 276.

(*a*) *Hunt v. Wimbledon Local Board* (1878) 4 C. P. Div. at pp. 53, 57, 48 L. J. C. P. 207.

(*b*) *Frend v. Dennett* (1858) 4 C. B. N. S. 576, 27 L. J. C. P. 314; *Hunt v. Wimbledon Local Board* (1878) 3 C. P. D. 208, in C. A., 4 C. P. Div. 48, 48 L. J. C. P. 207; *Young & Co. v. Mayor of Leamington* (1883) 8 App. Ca. 517, 52 L. J. Q. B. 713. In *Eaton v. Basker* (1881) 7 Q. B. Div. 529, 50 L. J. Q. B. 444, it was decided that a provision of this kind in the Public Health Act, 1875, applies only to contracts known at the time of making them to exceed the specified "value or amount" of 50*l*.

tract incidental to the ordinary conduct of its business ; but it cannot bind itself by negotiable instruments unless the making of such instruments is a substantive part of that business, or is provided for by its constitution (c).

A non-trading corporation, if expressly created for special purposes, may make without seal any contract incidental to those purposes ; if not so created, cannot (it seems) contract without seal except in cases of immediate necessity, constant recurrence, or trifling importance.

In any case where an agreement has been completely executed on the part of a corporation, it becomes a contract on which the corporation may sue.

The rights and obligations arising from the tenancy or occupation of land without an express contract apply to corporations both as landlords and as tenants or occupiers in the same manner (d) and to the same extent as to natural persons.

A corporation is bound by an obligation implied in law whenever under the like circumstances a natural person would be so bound.

It is much to be wished that the whole subject should be reviewed and put on a settled footing by the Court of Appeal, and that those cases which are already virtually overruled should be expressly declared to be no longer of authority (e).

2. *Negotiable instruments.*

The peculiar contracts undertaken by the persons who issue or endorse negotiable instruments must by the nature of the case be in writing. Part of the definition of a bill of exchange is that it is an unconditional order in

Negotiable instruments.

(c) See pp. 130, 131, *supra*.

(d) Assuming *Finlay v. Bristol & Exeter Ry. Co.* (1852) 7 Ex. 409, 21 L. J. Ex. 117, not to be now law.

(e) See per Lord Blackburn, 8 App. Ca. at p. 523, agreeing with Lindley L.J. 8 Q. B. Div. at p. 585.

writing (*f*). The acceptance of a bill of exchange, though it may be verbal as far as the law merchant is concerned, is required by statute to be in writing and signed (*g*).

3. *As to purely statutory forms.*

Statute of
Frauds.

A. Contracts within the Statute of Frauds.

To write a commentary on the Statute of Frauds would be beyond the scope of this work. It may be convenient however to state as shortly as possible, so far as contracts are concerned, the contents of the statute and some of the leading points established on the construction of it.

The statute (29 Car. 2, c. 3) enacts that no action shall be brought on any of the contracts specified in the 4th section "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized." The contracts comprised in this section are—

Promises
by execu-
tor, &c.

α. Any special promise by an executor or administrator "to answer damages out of his own estate." No difficulty has arisen on the words of the statute, and the chief observation to be made is the almost self-evident one (which equally applies to the other cases within the statute) that the existence of a written and signed memorandum is made a necessary condition of the agreement being enforceable, but will in no case make an agreement any better than it would have been apart from the statute. A good consideration, a real consent of the parties to the same thing in the same sense, and all other things necessary to make a contract good at common law are still required as much as before (*h*).

(*f*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3. So of promissory notes, s. 83.

(*g*) *Ib.* s. 17.

(*h*) As to these contracts of executors, 1 Wms. Exors. Pt. 2, Bk. 2, c. 2.

β. "Any special promise to answer for the debt default or miscarriages of another person." Guaranties.

On this the principal points are as follows. A promise is not within the statute unless there is a debt &c. of some other person for which that other is to remain liable (though the liability need not be a present one): for there can be no contract of suretyship or guaranty unless and until there is an actual principal debtor. "Take away the foundation of principal contract, the contract of suretyship would fail" (i). Where the liability, present or future, of a third person is assumed as the foundation of a contract, but does not in fact exist, then, independently of the statute, and on the principle of a class of cases to be explained elsewhere, there is no contract. On the other hand a promise to be primarily liable, or to be liable at all events, whether any third person is or shall become liable or not, is not within the statute and need not be in writing. It may be an indemnity, it is not a guaranty (j). Whether particular spoken words, not in themselves conclusive, *e. g.* "Go on and do the work and I will see you paid," amount to such a promise or only to a guaranty is a question of fact to be determined by the circumstances of the case (k).

Nor is a promise within the statute unless it is made to the principal creditor: "The statute applies only to promises made to the person to whom another is answerable" (l) or is to become so.

A mere promise of indemnity is not within the statute (m), though any promise which is in substance within it cannot be taken out of it by being put in the form of an

(i) *Mountstephen v. Lakeman* (1871) L. R. 7 Q. B. 196, 202 (in Ex. Ch.), 43 L. J. Q. B. 188, per Willes J.; *affd.* L. R. 7 H. L. 17, nom. *Lakeman v. Mountstephen* (1874).

(j) *Guild & Co. v. Conrad* [1894] 2 Q. B. 885, 63 L. J. Q. B. 721.

(k) *Lakeman v. Mountstephen*, *Guild & Co. v. Conrad*, *supra*.

(l) *Eastwood v. Kenyon* (1840) 11

A. & E. 438, 446; concess. *Cripps v. Hartnoll* (1863) 4 B. & S. 414, 32 L. J. Q. B. 381 (Ex. Ch.).

(m) *Cripps v. Hartnoll* (last note); *Wildes v. Dudlow* (1874) L. R. 19 Eq. 198, 44 L. J. Ch. 341. So of an indemnity by one partner to his co-partners in respect of a doubtful debt from a third person to the firm: *Re Hoyle* [1893] 1 Ch. 84, 62 L. J. Ch. 182, C. A.

indemnity (*n*). A promise to bear contingent losses in a transaction in which the promisor has an independent interest is a promise of indemnity and not a guaranty (*o*).

A contract to give a guaranty at a future time is as much within the statute as the guaranty itself (*p*).

Agree-
ments
upon con-
sideration
of mar-
riage.

γ. "Any agreement made upon consideration of marriage." A promise to marry is not within these words, the consideration being not marriage, but the other party's reciprocal promise to marry. For further remarks on the effect of this clause, see Chapter XIII. on Agreements of Imperfect Obligation, *infra*.

In the old books we frequently meet with another sort of difficulty touching agreements of this kind; it was much doubted whether matrimony were not so purely spiritual a matter that all agreements concerning it must be dealt with only by the ecclesiastical courts: the type of these disputed contracts is a promise by A. to B. to pay B. 10*l.* if he will marry A.'s daughter. But this by the way (*q*).

(*n*) *Cripps v. Hartnoll*, note (*l*) last page.

(*o*) *Sutton v. Grey* [1894] 1 Q. B. 285, 63 L. J. Q. B. 633.

(*p*) *Mallet v. Bateman* (1865) L. R. 1 C. P. 163 (Ex. Ch.), 35 L. J. C. P. 40. See further on this clause, 1 Wms. Saund. 229—235, or 1 Sm. L. C. 334, note to *Birkmyr v. Darnell* (1705). Cp. *Wallace v. Gibson* [1895] A. C. 354, on the Mercantile Law (Scotland) Amendment Act.

(*q*) Such promise may be sued on in the King's Court if by deed, 22 Ass. 101, pl. 70; otherwise if he had promised 10*l.* *with his daughter in marriage*, then it should be in the Court Christian, Trin. 45 Ed. III. 24, pl. 30; action good without specialty where the marriage had taken place, Mich. 37 H. VI. 8, pl. 18; *contra* (not without dissent), Trin. 17 Ed. IV. 4, pl. 4. In Bracton's time the ex-

clusive jurisdiction of the spiritual courts appears to have been admitted: "ad forum seculare trahi non debet per id quod minus est et non principale id quod primum et principale est in foro ecclesiastico, ut si ob causam matrimonii pecunia promittatur, licet videatur prima facie quod cognitio super catallis et debitis pertineat ad forum seculare, tamen propter id quod maius est et dignius trahitur cognitio pecunie promissae et debite ad forum ecclesiasticum, et ubi [*? ibi*] locum non habet prohibitio, cum debitum sit de testamento vel matrimonio:" folio 175 *a*. It should be remembered that ordinary debts were still indirectly enforced in the spiritual courts by the imposition of penance: 22 Ass. *ubi sup.* The so-called statute of *Circumspecte agatis* appears to have been construed as allowing this if the spiritual court did not directly order payment of the debt.

δ. "Any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." This clause is usually and conveniently considered as belonging to the topic of Vendors and Purchasers of real estate; and the reader is referred to the well-known works which treat of that subject (*r*). Questions have arisen, however, whether sales of growing crops and the like were sales of an interest in lands within the 4th section or of goods within the 17th (*s*). A sale of tenant's fixtures, being a sale only of the right to sever the fixtures from the freehold during the term, is not within either section (*t*). Interests in land.

By the 1st and 2nd sections of the statute leases for more than three years, or reserving a rent less than two-thirds of the improved value, must be in writing and signed by the parties or their agents authorized *in writing*, and now by 8 & 9 Vict. c. 106, s. 3, they must be made by deed. But an informal lease, though void as a lease, may be good as an agreement for a lease (*u*). Leases.

ε. "Any agreement that is not to be performed within the space of one year from the making thereof." Agreements not to be performed within a year.

"Is not to be," not "is not" or "may not be." This means an agreement that on the face of it cannot be performed within a year. An agreement capable of being performed within a year, and not showing any intention to put off the performance till after a year, is not within

(*r*) As to an agreement collateral to a demise of land not being within the statute, see *Morgan v. Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46; *Erskine v. Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Angell v. Duke* (1875) L. R. 10 Q. B. 174, 44 L. J. Q. B. 78; *De Lassalle v. Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A. As to the distinction between a demise and a mere licence or agreement for the use of land without any

change of possession, *Wells v. Kingston-upon-Hull* (1875) L. R. 10 C. P. 402, 44 L. J. C. P. 257.

(*s*) *Marshall v. Green* (1875) 1 C. P. D. 35, 45 L. J. C. P. 153. As to building materials to be severed from the soil, *Lavery v. Pursell* (1888) 39 Ch. D. 508, 57 L. J. Ch. 570. And see 1 Wms. Saund. 395.

(*t*) *Lee v. Gaskell* (1876) 1 Q. B. D. 700, 45 L. J. Q. B. 540.

(*u*) *Dart, V. & P.* 1. 198.

this clause (*x*). Nor is an agreement within it which is completely performed by one party within a year (*y*). It appears to be now settled that an agreement depending on the life of a party or of some other person, or otherwise determinable on a contingency which may possibly happen within a year, though this be not expected or desired by the parties, is not within this branch of the statute (*z*).

Astos. 17. The seventeenth section of the statute (sixteenth in the Revised Statutes) (*a*) was extended by Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 7, so as to include all executory sales of goods of the value of 10*l.* and upwards, whether the goods be in existence or not at the time of the contract. In England these enactments are superseded and consolidated by the Sale of Goods Act, 1893 (*b*). We will here only refer very briefly to the question of what is a sufficient memorandum of a contract, as to which the decisions on the Statute of Frauds remain applicable.

The
"note or
memoran-
dum."

There is a curious difference in the judicial interpretation of the "agreement" of which a memorandum or note is required by s. 4, and the "bargain" of which a note or memorandum was required by s. 17. The "agreement" of s. 4 includes the consideration of the contract, so that a writing which omits to mention the consideration does not satisfy the words of that section: but the "bargain" of s. 17 includes the price of the goods as a material term

(*x*) *Smith v. Neale* (1857) 2 C. B. N. S. 67, 26 L. J. C. P. 143.

(*y*) *Cherry v. Heming* (1849) 4 Ex. 631, 19 L. J. Ex. 63. See notes to *Peter v. Compton*, 1 Sm. L. C. 359.

(*z*) *McGregor v. McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 591, overruling *Davey v. Shannon* (1879) 4 Ex. D. 81, and (it should seem) *Eley v. Positive Assurance Co.* (1876) 1 Ex. D. 20 (in C. A. *ib.* 88, not on this point), 45 L. J. Ex. 451. The English decisions appear to be received in America: see *Warner*

v. Texas and Pacific Ry. (1896) 164 U. S. 418.

(*a*) The difference arises from the preamble and the enacting part of s. 13 being separately numbered as 13 and 14 in other editions. The section is commented on in detail in Blackburn on Sale, Benjamin on Sale, and Mr. Chalmers' ed. of the Sale of Goods Act, 1893 (1894). A recent case of some importance on acceptance is *Taylor v. Smith*, C. A. [1893] 2 Q. B. 65, 61 L. J. Q. B. 331.

(*b*) 56 & 57 Vict. c. 71, s. 4.

only where it has been specifically agreed upon (*c*). So far as regards guaranties, however, this construction of s. 4 having been found inconvenient is excluded by the Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 3, which makes it no longer necessary that the consideration for a "special promise to answer for the debt default or miscarriage of another person" should appear in writing or by necessary inference from a written document (*d*).

The note or memorandum under the 4th as well as the 17th section (or Sale of Goods Act) must show what is the contract and who are the contracting parties (*e*), but it need be signed only by the party to be charged, whether under the 4th or the 17th section, and indeed it need not be signed in the common meaning of the word, for the party's name inserted by his authority in the body or at the head of the memorandum may suffice (*f*). It is no answer to an action on a contract evidenced by the defendant's signature to say that the plaintiff has not signed and therefore could not be sued, and if a written and duly signed proposal is accepted by word of mouth the contract itself is completed by such acceptance and the writing is a

(*c*) *Hoadly v. McLaine* (1834) 10 Bing. 482, 38 R. R. 510.

(*d*) See also an article by the late Sir James Stephen and the present writer in the Law Quarterly Review, i, 1, and the notes to *Birkmyr v. Darnell* (1705) and *Wain v. Warlters* (1804) 7 R. R. 645, in 2 Sm. L. C. 266.

(*e*) *Williams v. Byrnes* (1863) 1 Moo. P. C. N. S. 154; *Newell v. Radford* (1867) L. R. 3 C. P. 52, 37 L. J. C. P. 1; *Williams v. Jordan* (1877) 6 Ch. D. 517, 46 L. J. Ch. 681; and as to sufficiency of description otherwise than by name, *Rossiter v. Miller* (1878) 3 App. Ca. 1124, 48 L. J. Ch. 10; *Catling v. King* (1877) 5 Ch. Div. 660, 46 L. J. Ch. 384; *Jarrett v. Hunter*

(1886) 34 Ch. D. 182; *Coombs v. Wilkes* [1891] 3 Ch. 77, 61 L. J. Ch. 42; *Filby v. Hounsell* [1896] 2 Ch. 737, 65 L. J. Ch. 852 (name of agent for undisclosed vendor sufficient); *Carr v. Lynch* [1900] 1 Ch. 613, 69 L. J. Ch. 345 (reference to payment made by purchaser without name). As to what is sufficient description of the property sold under s. 4, *Shardlow v. Cotterell* (1881) 20 Ch. Div. 90, 51 L. J. Ch. 353; *Plant v. Bourn* [1897] 2 Ch. 281, 66 L. J. Ch. 643, C. A.

(*f*) *Evans v. Hoare* [1892] 1 Q. B. 593, 61 L. J. Q. B. 470. As to the authority of an auctioneer to sign as agent for a purchaser, and its duration, see *Bell v. Balls* [1897] 1 Ch. 663, 66 L. J. Ch. 397.

sufficient memorandum of it (*g*). It has also been decided that an acknowledgment of a signature previously made by way of proposal, the document having been altered in the meantime and the party having assented to the alterations, is equivalent to an actual signature of the document as finally settled and as the record of the concluded contract. The signature contemplated by the statute is not the mere act of writing, but the writing coupled with the party's assent to it as a signature to the contract: and the effect of the parol evidence in such a case is not to alter an agreement made between the parties but to show what the condition of the document was when it became an agreement between them (*h*). Moreover it matters not for what purpose the signature is added, since it is required only as evidence, not as belonging to the substance of the contract. It is enough that the signature attests the document as that which contains the terms of the contract (*i*). Nor need the particulars required to make a complete memorandum be all contained in one document: the signed document may incorporate others by reference, but the reference must appear from the writing itself and not have to be made out by oral evidence: for in that case there would be no record of a contract in writing, but only disjointed parts of a record pieced out with unwritten evidence (*k*). The reference, however, need not be in express terms. It is enough if it appears on the documents that they are parts of the same agreement (*l*). One

(*g*) *Smith v. Neale* (1857) 2 C. B. N. S. 67, 26 L. J. C. P. 143; *Reuss v. Picksley* (1866) in Ex. Ch. L. R. 1 Ex. 342, 35 L. J. Ex. 218. And where alternative offers are made by a signed writing, parol acceptance of one alternative has been held sufficient: *Lever v. Koffler* [1901] 1 Ch. 543, 70 L. J. Ch. 395.

(*h*) *Stewart v. Eddowes* (1874) L. R. 9 C. P. 311, 43 L. J. C. P. 204.

(*i*) *Jones v. Victoria Graving Dock Co.* (1877) 2 Q. B. Div. 314, 323, 46 L. J. Q. B. 219. It may be doubted

whether this view of the statute does not tend to thrust contracts upon parties by surprise and contrary to their real intention.

(*k*) See *Peirce v. Corf* (1874) L. R. 9 Q. B. 210, 43 L. J. Q. B. 52; *Kronheim v. Johnson* (1877) 7 Ch. D. 60, 47 L. J. Ch. 132; *Leather Cloth Co. v. Hieronimus* (1875) L. R. 10 Q. B. 140, 44 L. J. Q. B. 54.

(*l*) *Studds v. Watson* (1884) 28 Ch. D. 305; *Wylson v. Dunn* (1887) 34 Ch. D. 569; *Oliver v. Hunting* (1890) 44 Ch. D. 205, 59 L. J.

who is the agent of one party only in the transaction may be also the agent of the other party for the purpose of signature (*m*). The memorandum must exist at the time of action brought (*n*).

It seems that the Statute of Frauds does not apply to deeds. Signature is unnecessary for the validity of a deed at common law, and it is not likely that the Legislature meant to require signature where the higher solemnity of sealing (as it is in a legal point of view) is already present (*o*). But as in practice deeds are always signed as well as sealed, and distinctive seals are hardly ever used except by corporations, the absence of a signature would nowadays add considerably to the difficulty of supporting a deed impeached on any other ground.

Seemle,
deeds not
within the
Statute.

The law as to the sale and disposition of personal chattels is affected, in addition to the Statute of Frauds, by the Bills of Sale Acts, 1878 and 1882, with minor amending Acts of 1890 and 1891; but the subject is too special to be entered on here.

Bills of
Sale Acts.

Transfers of British ships are required by the Merchant Shipping Act, 1894 (s. 24 *sqq.*) to be in the form thereby prescribed. Assignments of copyright are directly or indirectly required by the various statutes on that subject to be in writing (*p*), and in the case of sculpture by deed attested by two witnesses (54 Geo. 3, c. 56, s. 4). But an

Transfers
of ships
and copy-
right.

Ch. 255, where the judgment states that the old rule was different; *Pearce v. Gardner* [1897] 1 Q. B. 688, 66 L. J. Q. B. 457, C. A. (envelope and letter proved to have been enclosed in it may be taken as one document to identify addressee).

(*m*) As to this, *Murphy v. Boese* (1875) L. R. 10 Ex. 126, 44 L. J. Ex. 40.

(*n*) *Lucas v. Dixon* (1889) 22 Q. B. Div. 357, 58 L. J. Q. B. 161 (defendant's affidavit on interlocu-

tory proceedings in the action will not do).

(*o*) *Cherry v. Heming* (1849) 4 Ex. 631, 19 L. J. Ex. 63. Blackstone (2. 306, and see note in Stephen's Comm., l. 510, 6th ed.) assumed signature to be necessary.

(*p*) *Leyland v. Stewart* (1876) 4 Ch. D. 419, 46 L. J. Ch. 103; and as to designs, *Jewitt v. Eckhardt* (1878) 8 Ch. D. 404. The confusion of our copyright statutes is still a disgrace to British legislation.

executory agreement for an assignment of copyright apparently need not be in writing. And informal executory agreements for the sale or mortgage of ships seem now to be valid as between the parties, though under earlier Acts it was otherwise, and it is doubtful whether at common law a sale without writing would pass the property (*q*).

Sale of
horses in
market
overt.

There is "An Act to avoid Horse-stealing" of 31 Eliz. c. 12, which prescribes sundry forms and conditions to be observed on sales of horses at fairs and markets: and "every sale gift exchange or other putting away of any horse mare gelding colt or filly, in fair or market not used in all points according to the true meaning aforesaid shall be void" (*r*). The earlier Act on the same subject, 2 & 3 Phil. & Mary, c. 7, only deprives the buyer of the benefit of the peculiar rule of the common law touching sales in market overt. These Acts are not touched by the Sale of Goods Act, 1893: see s. 22.

Marine
insurance.

B. Marine Insurances.

By 30 Vict. c. 23, s. 7, marine insurances must (with the exception of insurances against owner's liability for certain accidents) be expressed in a policy.

But the words are not so strict as those of the repealed statutes on the same subject, and the preliminary "slip," which in practice though not in law is treated as the real contract, has for many purposes been recognized by the later decisions. These will be spoken of in another place under the head of Agreements of Imperfect Obligation (Chap. XIII.).

Transfer
of shares.

C. Transfer of Shares.

There is no general principle or provision applicable to the transfer of shares in all companies. But the general

(*q*) Maude and Pollock on Merchant Shipping, 4th ed. pp. 42, 55, 56. And see the Merchant Ship-

ping Act, 1894, s. 57.

(*r*) *Moran v. Pitt* (1873) 42 L. J. Q. B. 47.

or special Acts of Parliament governing classes of companies or particular companies always or almost always prescribe forms of transfer. An executory contract for the sale of shares need not as a rule be in writing.

D. Acknowledgment of barred debts.

The operation of the Statute of Limitation, 21 Jac. 1, c. 16, in taking away the remedy for a debt may be excluded by a subsequent promise to pay it, or an acknowledgment from which such promise can be implied. The promise or acknowledgment if express must be in writing and signed by the debtor (9 Geo. 4, c. 14, s. 1) or his agent duly authorized (19 & 20 Vict. c. 97, s. 13). We say more of this under the head of Agreements of Imperfect Obligation, Chap. XIII. below.

Promise to
pay debt
barred by
Statute of
Limita-
tion.

CHAPTER IV.

CONSIDERATION.

Consideration what. THE following description of Consideration was given by the Exchequer Chamber in 1875: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other" (a).

The second branch of this judicial description is really the more important one. Consideration means not so much that one party is profited as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first. It does not matter whether the party accepting the consideration has any apparent benefit thereby or not: it is enough that he accepts it, and that the party giving it does thereby undertake some burden, or lose something which in contemplation of law may be of value.

An act or forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

A consideration, properly speaking, can be given only for a promise. Where performance on both sides is simultaneous, there may be agreement in the wider sense, but

(a) *Currie v. Misa* (1875) L. R. 10 Ex. at p. 162, 44 L. J. Ex. 94; per Cur. referring to Com. Dig. Action on the Case, Assumpsit B. 1—15. Cp. Evans, Appendix to Pothier on Obligations, No. 2; and *Edgware*

Highway Board v. Harrow Gas Co. (1874) L. R. 10 Q. B. 92, 95, 44 L. J. Q. B. 1; and for the historical distinction between debt and assumpsit in this respect, Langdell, Summary, §§ 64, 65.

there is no obligation and no contract. It may be amusing and not un instructive to consider the distinctions to be observed in the legal analysis of such common dealings as being ferried across a river and paying on the other side, buying a newspaper on a railway platform, obtaining a box of matches from an automatic machine. The reader may multiply examples at his pleasure.

A consideration which is itself a promise is said to be *executory*. A consideration which consists in performance is said to be *executed*. It is important to remember that in the former case "it is the counter-promise and not the performance that makes the consideration" (b).

Consideration is that which is actually given and accepted in return for the promise. Ulterior motives, purposes, or expectations may be present, but in a legal point of view they are indifferent. The party seeking to enforce a promise has to show the actual legal consideration for it, and he need not show anything beyond (c).

An informal promise made without a consideration, however strong may be the motives or even the moral duty on which it is founded, is not enforced by English courts of justice at all. Even a formal promise, that is a promise made by deed, or in the proper technical language a covenant, is deprived, if gratuitous, of some of the most effectual remedies administered by them. A promise to contribute money to charitable purposes is a good example of the class of promises which, though they may be laudable and morally binding, are not contracts (d).

Gratuitous promises.

The early history of the law of Consideration is still somewhat obscure, but some acquaintance with it is neces-

History of the doctrine.

(b) Hobart in *Lampleigh v. Brathwait* (1616) 1 Sm. L. C. 155.

(c) *Thomas v. Thomas* (1842) 2 Q. B. 851, Finch Sel. Ca. 263 (see correction at p. 281 of a bad clerical slip in the original report). In *Coles v. Pilkington* (1874) L. R. 19 Eq. 174, 44 L. J. Ch. 381, this case was strangely overlooked.

(d) *Cottage Street Church v. Ken-*

dall (1877) 121 Mass. 528; *Re Hudson, Creed v. Henderson* (1885) 54 L. J. Ch. 811. A contract may arise, however, if the subscriber authorizes a definite expenditure which is incurred in reliance on his making it good: see *Kedar Nath Bhattacharji v. Gorie Mahomed* (1886) I. L. R. 14 Cal. 64; *qu.* if right on the facts.

sary for understanding the fluctuations on certain points which lasted well into the nineteenth century, and one or two anomalies which have survived.

The name of Consideration appears only about the beginning of the sixteenth century, and we do not know by what steps it became a settled term of art. The word seems to have gone through the following significations: first, contemplation in general; then deliberate decision on a disputed question (hence the old form of judgments in the Common Law Courts, "It is considered") (*e*); then the grounds as well as the act of deliberation; and lastly, in particular, that which induces a grant or promise. If we wish to form a probable opinion as to the origin or origins of this final modification, we must inquire how far anything like the thing signified was to be found in the old action of debt, or was involved in the necessary elements of the new action of assumpsit. We must also remember that the demand was for an extended remedy on business agreements, and, from the pleader's point of view, for an action which would enable him to rescue an increasing and lucrative branch of practice from the monopoly of ecclesiastical jurisdiction in matters of breach of faith (*f*), and at least to compete on equal terms with the Court of Chancery. Nobody wanted merely fanciful or gratuitous promises to be made binding without form, and there was no need for haste in defining exactly where the line should be drawn.

Quid pro quo in action of debt.

The action of debt assumed that the defendant had money or chattels (*g*) which belonged to the plaintiff;

(*e*) Altered to "adjudged" by the Judicature Act for no obvious reason, unless it were that the word "adjudge" was equally unknown to the operative forms of common law and equity, though it was current with text-writers from the sixteenth century onwards.

(*f*) It is said that the King's judges had the remedy of prohi-

bition in their hands. No doubt the spiritual courts often might have been prohibited, and sometimes were; but one has only to look at Hale's *Precedents and Proceedings*, representing a small part of what went on all over the country, to see that in fact they got the business.

(*g*) Harv. Law Rev. viii. 260.

either because the defendant had actually received so much from the plaintiff, or because he had received from him something else which he admitted to be equivalent to the money or goods claimed. As the buyer of goods had acquired property in the goods, so did a sum of his money measured by the agreed price become, in the medieval view, the property of the seller. There was a change of property by "reciprocal grants" (*h*). Thus the debt could not be established without showing that the debtor had received some equivalent or "recompense." In the fifteenth century this equivalent was called *Quid pro quo*, a peculiarly English term (*i*). The words bargain and contract, especially the latter, also came to be associated with the action of debt in the fifteenth and sixteenth centuries. In fact contract meant a "real contract," a transaction on which an action of debt might be brought (*k*). Mere one-sided speech could no more pass property in money than in goods.

The action of assumpsit was not to recover anything supposed to be the plaintiff's, or for restitution, but to recover damages for the breach of an active duty towards the plaintiff which had been expressly "assumed" by the defendant, or was attached by law to the exercise of his calling. If the defendant's "assumption" had not induced the plaintiff to incur risk or trouble in some way to his own detriment, there was no wrong done and no ground of action. Here again bare words of promise, as such, would create no duty; nor could mere disappointment be regarded as actionable damage. It was a considerable time before the fact that assumpsit was in substance an action to enforce contracts was in any way formally recognized; but this could not be much delayed when it was settled that the existence of a debt was a

Detriment
to pro-
misee in
assumpsit.

(*h*) *Edgcomb v. Dee*, pp. 137, 138, above.

(*i*) It is not otherwise known to Du Cange or his later editors.

(*k*) See H. L. R. viii. 253; the title of Debt in the Abridgments; and even later, *Termes de la Ley*, s. v. Contract.

sufficient ground for an action in assumpsit, the defendant not being allowed to admit the existence of a duty to pay the defendant and deny that he had undertaken to fulfil it.

Thus we have both in debt and in assumpsit the notion of some kind of value received as an element in the defendant's liability; in the later application of assumpsit concurrently with debt this element is identical with the *quid pro quo* of debt (*l*); in the original assumpsit founded on an actual promise it is distinct.

The
canonist
expansion
of *causa* in
Roman
law:
"con-
sidera-
tion" in
Doctor
and
Student.

Meanwhile the canonists of Europe, in opposition to the more technical views of the civilians, had been generalizing the Roman law of contract and breaking down its formalities. The *causa* which made a pact actionable was no longer one of a limited set of circumstances or "vestments" applicable, according to their nature, to particular and limited classes of transactions; it might be any reason for making a promise which appeared serious enough to be the foundation of a moral duty to fulfil the expectation created. It is possible that English canonists used the word "consideration" to translate this extended sense of *causa* before it was familiar to the common lawyers. At any rate St. German, in his well-known Dialogue, first published in English in 1530 (*m*), puts this word in the mouth not of the Student but of the Doctor. The Student in the laws of England, explaining "what is a nude contract or naked promise in the laws of England, and where an action may lie thereupon, and where not" (*n*), speaks of recompense, of "a nude contract . . . where a man maketh a bargain, or a sale of his goods or lands, without any recompense appointed for it," and of "a nude or naked promise . . . where a man promiseth another to give him certain money such a day, or to build an house, or to do him such certain service, and nothing is assigned

(*l*) Prof. Ames in Harv. Law Rev. ii. 18.

(*m*) The Latin ed. pr. (1523, reprinted 1528) contained only the

first Dialogue; and this also is amplified in the English version.

(*n*) Question put by the Doctor, Dial. 2, c. 23, *ad fin.* The discussion follows in c. 24.

for the money, for the building, nor for the service”; in which cases no action lies (*o*). It is the Doctor of Divinity who takes up the distinct question of what promises are binding in conscience, and distinguishes “promises made to a man upon a certain consideration . . . as if A. promise to give B. xx*l*. because he hath made him such a house or hath lent him such a thing”—which is generally binding—from a promise which is “so naked that there is no manner of consideration why it should be made,” and does not even create a moral obligation. Here the language is not technical, but is rather a literary explanation addressed to the Student, who is presumed not to know civil or canon law, and would not understand the Romanist term *causa*.

The word “consideration” had already been used in English Courts in discussing the validity not of promises but of uses; there is nothing to show any connexion with the learning, civilian or canonist, of *causa*, but on the contrary “consideration” in this context is rather analogous to the *quid pro quo* of debt, though wider. On the whole the transitional view of the early sixteenth century seems to have been that a use was created by the will of the grantor, but his will could not be known by the Court without sufficient proof of his intent; and such proof might consist in the mutuality of the transaction (including the creation of a tenure as well as actual value received), or in the existence of a natural duty towards the *cestui que use*. Either kind of reason was called consideration. It is common learning that the mere solemnity of a deed was never held sufficient for this purpose (*p*).

(*o*) It is not manifest whether the author means to allude to the action of *assumpsit* or not. I think he was more likely to regard it as a remedy for a wrong independent of contract, and not to have it before his mind at all in this place. The action on the case for negligence, which was one

origin of *assumpsit*, is recognized: “if I take [goods to keep safely], and after they be lost or impaired through my negligent keeping, there an action lieth.”

(*p*) Y. B. 20 H. VII. 10, pl. 20; Bro. Ab. Feoffements and Uses, pl. 40. (This is dated 1533, a little later than St. German’s book, but

On the whole the Doctor, who represents the canonist half of St. German's extraordinary learning, appears to use "consideration" as a semi-popular word, which will dispense him from going into technical details, and be sufficiently accurate for his purpose. As the book rapidly became well known for its merits as an exposition of the Common Law, it may well be that this very passage contributed to the current use of the word among the serjeants and apprentices at Westminster, and suggested its application to actions on promises, of which no earlier example has been found.

No probable connexion of *causa* with the Common Law doctrine.

There is nothing to show that it was so applied by common lawyers with any conscious reference to either the civilian or the canonist interpretation of the Roman *causa*; nor had they any need to call in such notions. The *quid pro quo* which the defendant in debt must have received, and the damage which the plaintiff in assumpsit must have suffered by relying on the defendant's undertaking, were sufficient to form the notion of consideration without any extraneous matter. In fact the Romanist conception could not have been fitted into the English legal categories. In its later canonical form it was too wide for the common lawyer's purposes (*q*), as in its ancient classical form it was too narrow (*r*).

practically contemporary.) In *Sharington v. Strotton* (1565), Plowd. 302, the analogy of *quid pro quo* was relied on in the unsuccessful argument for the plaintiff.

(*q*) Save in the point, unknown to English law, that a plaintiff suing on a promise must show that its performance was of some value to himself: Pothier, Obl. §§ 54, 55, 60, Code Nap. 1119. It is said that a promise by A. to B. to do something useful to Z., but not to B., is binding in conscience only. Z. cannot sue because he is not party to the contract, nor B. because he has no interest in its performance. So the modern civilians interpreted the rule *alteri stipulari*

nemo potest and Ulpian's gloss, *ut alii detur nihil interest mea*, D. 45, 1. de v. o. 38, § 17. Bracton seems not to have accepted the Roman doctrine, see Maitland, Bracton and Azo, 154-155. It is far from certain that *causa* was really a current term in the early part of the 16th century among any canonists or civilians from whom Englishmen were likely to borrow.

(*r*) Ulpian in one place, D. 19. 5. de praeser. verbis, 15, goes near to a generalization when he says of the promise of a reward for information of a runaway slave: "*Conventio ista non est nuda, ut quis dicat ex pacto actionem non oriri, sed habet in se negotium aliquod.*"

No one ever argued before an English temporal Court that deliberate bounty or charitable intention will support a formless promise ; but such was undoubtedly the canonical view, and is to this day, in theory, the rule of legal systems which have followed the modern Roman law (s). There was no room within the common law scheme of actions for turning natural into legal obligation (t).

We may now trace the characteristic points of the English doctrine. It was understood as early as the third quarter of the fifteenth century, with reference to the *quid pro quo* of Debt, that apparent benefit to the promisor is immaterial. In 1459 we have this case.

Benefit to
promisor
not
material.

Debt in the Common Pleas on an agreement between the plaintiff and defendant that plaintiff should marry one Alice, the defendant's daughter, on which marriage defendant would give plaintiff 100 marks. Averment that the marriage had taken place and the defendant refused to pay. Danvers J. said : "The defendant has *quid pro quo* : for he was charged with the marriage of his daughter and by the espousals he is discharged, so the plaintiff has done what was to be paid for. So if I tell a man, if he will carry twenty quarters of wheat of my master Prisot's to G., he shall have 40s., and thereupon he

(s) Pothier, Obl. § 42 ; Sirey and Gilbert on Code Nap. 1131 ; Demolombe, Cours du Code Nap. xxiv. 329 *sqq.* ; Langdell, Sel. Ca. Cont. 169 ; so in Germany from the 17th century onwards, with only theoretical differences as to the reason of the rule : Seuffert, Zur Gesch. der obligatorischen Verträge, 130 *sqq.*

(t) The view here given is substantially that of Prof. Ames of Harvard (The History of Assumpsit, Harv. Law Rev. ii. 1, 53), who has put the whole subject on a new footing. Chief Justice Holmes's ingenious attempt to make the *quid pro quo* of debt cover the whole ground, and connect it with the functions of the *secta* in Anglo-Norman procedure, does not seem acceptable : see Pollock and Maitland, Hist. Eng. Law, ii. 214.

As to civilian influence, it is impossible to prove that there was none, but for the reasons in the text I think very little of it reached the minds of practising common lawyers. Mr. Salmond's learned argument (Essays in Jurisprudence and Legal History, No. iv.) fails to reconvert me to my own former opinion. One may almost say that, if there had been any real borrowing, there must have been more misunderstanding. The repetition of the one phrase *Ex nudo pacto non oritur actio*, caught up from the civilians, was, on the whole, harmless. As late as 1842 a desperate attempt was made by the late E. V. Williams J., when at the bar, to mix up the civilian *causa* with the doctrine of consideration : *Thomas v. Thomas*, p. 169 above.

carry them, he shall have his action of debt against me for the 40s.; and yet the thing is not done for me, but only by my command: so here he shows that he has performed the espousals, and so a good cause of action has accrued to him: otherwise if he had not performed them" (u). Moyle J.: "If I tell a surgeon, if he will go to one J. who is ill, and give him medicine and make him safe and sound, he shall have 100s.; there if the surgeon does cure J. he shall have a good action of debt against me for the 100s., although the thing was done for another and not for the defendant himself; if there is not *quid pro quo*, there is what comes to the same" (u). Prisot C.J. and Danby J. thought such an action not maintainable except on a specialty (though Prisot was impressed by Danvers's and Moyle's instances), and an objection was also taken to the jurisdiction on the ground of marriage being a spiritual matter: the case was adjourned and the result is not stated. But the point is quite clearly taken that what a man chooses to bargain for must be conclusively taken to be of some value to him.

Adequacy
of con-
sideration
not in-
quired
into.

It is really by a deduction from this that our Courts have in modern times laid it down as an "elementary principle that the law will not enter into an inquiry as to the adequacy of the consideration" (x). The idea is characteristic not only in English positive law but in the English school of theoretical jurisprudence and politics. Hobbes says: "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give" (y). And the legal rule is of long standing, and illustrated by many cases. "When a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action" (z). "A. is possessed of Blackacre, to

(u) M. 37 H. VI. 8, pl. 18.

(x) *Westlake v. Adams* (1858) 5 C. B. N. S. 248, 265, 27 L. J. C. P. 271, per Byles, J.

(y) *Leviathan*, pt. 1, c. 15.

(z) *Sturlyn v. Albany*, Cro. Eliz. 67, and see Cro. Car. 70, and marginal references there.

which B. has no manner of right, and A. desires B. to release him all his right to Blackacre, and promises him in consideration thereof to pay him so much money; surely this is a good consideration and a good promise, for it puts B. to the trouble of making a release" (a). The following are modern examples. If a man who owns two boilers allows another to weigh them, this is a good consideration for that other's promise to give them up after such weighing in as good condition as before. "The defendant," said Lord Denman, "had some reason for wishing to weigh the boilers, and he could do so only by obtaining permission from the plaintiff, which he did obtain by promising to return them in good condition. We need not inquire what benefit he expected to derive" (b). So parting with the possession of a document, though it had not the value the parties supposed it to have (c), and the execution of a deed (d), though invalid for want of statutory requisites (e), have been held good considerations. In like manner a licence by a patentee to use the patented invention is a good consideration though the patent should turn out to be invalid (f). In the Supreme Court of the United States a release of a supposed right of dower, which the parties thought necessary to confirm a title, has been held a good consideration for a promissory note (g). The modern theory of the obligation incurred by a bailee who has no reward is that the bailor's delivery of possession is the consideration for the bailee's promise to keep or carry safely. The bailor parts with the present legal control of the goods; and this is so far a detriment to him, though it may be no benefit to the bailee, and the bailee's taking the

(a) Holt C.J. 12 Mod. 459.

(b) *Bainbridge v. Firmstone* (1838) 8 A. & E. 743, 53 R. R. 234.

(c) *Haigh v. Brooks* (1839-40) (Q. B. and Ex. Ch.), 10 A. & E. 309, 320, 334, 50 R. R. 399, 407, 417. Or letting the promisor retain possession of a document to which the promisee is entitled: *Hart v. Miles* (1858) 4 C. B. N. S. 371, 27 L. J. O. P. 218.

(d) Cp. *Jones v. Waite* (1842) 9 Cl. & F. 101.

(e) See note (x), last page. The defendant had in fact had the full benefit of the consideration, the deed having been acted on.

(f) *Lawes v. Purser* (1856) 6 E. & B. 930, 26 L. J. Q. B. 25.

(g) *Sykes v. Chadwick* (1873) 18 Wallace, 141.

Same rule
in equity.

goods is for the bailor's use and convenience (*h*). The determination of a legally indifferent option in a particular way, as voting for a particular candidate for a charity where there is not any duty of voting for the candidate judged fittest, is legal "detriment" enough to be a good consideration (*i*). It has been held in equity, to the same effect, that a transfer of railway shares on which nothing has been paid is a good consideration (*k*); and that if a person indebted to a testator's estate pays the probate and legacy duty on the amount of the debt, this is a good consideration for a release of the debt by the residuary legatees (*l*): a strong case, for this view was an after-thought to support a transaction which was in origin and intention certainly gratuitous, and in substance an incomplete voluntary release; the payment was simply by way of indemnity, it being thought not right that the debtor should both take his debt out of the estate and leave the estate to pay duty on it. The consent of liquidators in a voluntary winding-up to a transfer of shares is a good consideration for a guaranty by the transferor for the payment of the calls to become due from the transferee (*m*). An agreement to continue—*i. e.*, not to determine immediately—an existing service terminable at will, is likewise a good consideration (*n*). The principle of all these cases may be summed up in the statement made in so many words by the judges in more than one of them, that the promisor has got all that he bargained for. The law will be satisfied that there was a real and lawful bargain, but it leaves

(*h*) O. W. Holmes, *The Common Law*, 291 *sqq.* Historically, the explanation is that the action sounded in tort until quite modern times, *ib.* 196. The bailor parts with very little, for, if the bailment is at will, he as well as the bailee can sue a trespasser. The real difficulty, however, is that in such cases, for the most part, the bailor does not deliver possession at the bailee's request, but requests the bailee to take it. One of the necessary elements is therefore fic-

titious. Cp. Langdell, § 68.

(*i*) *Bolton v. Madden* (1873) L. R. 9 Q. B. 55.

(*k*) *Cheale v. Kenward* (1858) 3 De G. & J. 27, 27 L. J. Ch. 784.

(*l*) *Taylor v. Manners* (1865) L. R. 1 Ch. 48, 35 L. J. Ch. 128, by Turner L.J. *dub.* Knight Bruce L.J.

(*m*) *Cleve v. Financial Corporation* (1873) L. R. 16 Eq. 363, 375, 43 L. J. Ch. 54.

(*n*) *Gravelly v. Barnard* (1874) L. R. 18 Eq. 518, 43 L. J. Ch. 659.

parties to measure their bargains for themselves. There has been another rather peculiar case in equity which was to this effect. An agreement is made between a creditor, principal debtor, and surety under a continuing guaranty, by which no new undertaking is imposed on the surety, but additional remedies are given to the creditor, which he is to enforce if requested to do so by the surety. Held that if by his own negligence the creditor deprives himself of the benefit of these remedies, the surety is discharged. The real meaning of what is there said about consideration seems to be that, as between the creditor and the surety, it is not material (*o*). It has been suggested that on a similar principle the consideration for a promise may be contingent, that is, it may consist in the future doing of something by the promisee which he need not do unless he chooses, but which being done by him, the contract is complete and the promise binding. But this cannot be. A consideration must be either a present act or forbearance or a promise. If a tradesman agrees to supply on certain terms such goods as a customer may order during a future period, this is not a promise, but an offer. He cannot sue the customer for not ordering any goods, but if, while the offer stands, the customer does order any, the condition of the offer is fulfilled, and the offer being thus accepted, there is a complete contract which the seller is bound to perform (*p*).

Contin-
gent con-
sideration.

(*o*) *Watson v. Allcock* (1853) 4 D. M. G. 242, 22 L. J. Ch. 858. The guaranty was determinable by notice from the surety, and it was suggested by way of supplying a new consideration that on the faith of the creditor's increased remedy the surety might in fact have abstained from determining it. But surely this will not do: the true ground is the creditor's original duty to the surety, which covers subsequently acquired rights and remedies.

(*p*) *G. N. Ry. Co. v. Witham* (1873) L. R. 9 C. P. 16, 43 L. J.

C. P. 13. Cp. *Chicago & G. E. Ry. Co. v. Dane* (1873) 43 N. Y. (4 Hand.) 240, where it was rightly held that a general assent to an offer of this kind (not undertaking to order, or as in the particular case tender to be carried, any definite quantity of goods) did not of itself constitute a contract. Cp. *R. v. Demers* [1900] A. C. 103, 69 L. J. P. C. 5; under French Canadian law, but no difference in principle is suggested. This seems to have been overlooked in *Ford v. Newth* [1901] 1 K. B. 683, 70 L. J. K. B. 459.

Inade-
quacy as
evidence
of fraud,
&c.

Great inadequacy of consideration may, however, be material as a cumulative element in cases of fraud and the like, though it will not alone be sufficient. This will be dealt with hereafter.

Pillans v.
Van
Mierop.

In the interesting eighteenth-century case of *Pillans v. Van Mierop* (*q*) the actual decision was on the principle that "any damage to another or suspension or forbearance of his right is a foundation for his undertaking, and will make it binding, though no actual benefit accrues to the party undertaking" (*r*). But Lord Mansfield threw out the revolutionary suggestion (which Wilmot J. showed himself inclined to follow, though not wholly committing himself to it) that there is no reason why agreements *in writing*, at all events in commercial affairs, should not be good without any consideration. "*A nudum pactum* does not exist in the usage and law of merchants. I take it that the ancient notion about the want of consideration was for the sake of evidence only in commercial cases amongst merchants the want of consideration is not an objection" (*s*). The anomalous character of this dictum was rightly seen at the time, and it has never been followed (*t*). It was too late to set up a new class of Formal Contracts, which was really the effect of Lord Mansfield's proposal. But if it had occurred a century or two earlier to a judge of anything like Lord Mansfield's authority, the whole course of the English law of contract might have been changed, and its principles might have been substantially assimilated to those of the modern civil law as adopted by the law of Scotland.

(*q*) (1765) 3 Burr. 1664, and Finch Sel. Ca. 269.

(*r*) Per Yates J. at p. 1674.

(*s*) 3 Burr. 1669-70.

(*t*) In 1778 it was distinctly contradicted by the opinion of the judges delivered to the House of Lords in *Rann v. Hughes* (1778) 7 T. R. 350, n.: "All contracts are, by the laws of England, distinguished into agreements by specialty and agreements by parol;

nor is there any such third class, as some of the counsel have endeavoured to maintain, as contracts in writing." Prof. Langdell ingeniously argues (Summary, §§ 49, 50), that contracts governed by the law merchant need on principle no consideration; in short, that a negotiable instrument is a specialty. It might have been better so. In this country one can only say *dis aliter visum*.

Another doctrine made current by Lord Mansfield and some of his colleagues with more success (*u*) was that the existence of a previous moral obligation constituted such a relation between the parties as would support an express promise. The Exchequer Chamber finally decided as late as 1840, that "a mere moral obligation arising from a past benefit not conferred at the request of the defendant" is not a good consideration (*x*). It is still not quite settled whether a past benefit is in any case a good consideration for a subsequent promise. On our modern principles it should not be (*y*), and it is admitted that it generally is not (*z*). For the past service was either rendered without the promisor's consent at the time, or with his consent but without any intention of claiming a reward as of right, in neither of which cases is there any foundation for a contract (*a*); or it was rendered with the promisor's consent and with an expectation known to him of reward as justly due, in which case there were at once all the elements of an agreement for reasonable reward. It is said, however, that services rendered on request, no definite promise of reward being made at the time, are a good consideration for a subsequent express promise in which the reward is for the first time defined. But there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth (*b*). It is

Promises
founded
on moral
duty.

Past con-
sideration
ineffec-
tual.

Supposed
excep-
tions:
Lamp-
leigh v.
Brath-
wait.

(*u*) See the note to *Wennall v. Adney*, 3 B. & P. 252, 6 R. R. 782, and in Finch Sel. Ca. at p. 358, which is approved by Parke B. in *Earle v. Oliver* (1848) 2 Ex. 71, at p. 90, and has long been regarded as classical on the whole question of past consideration.

(*x*) *Eastwood v. Kenyon* (1840) 11 A. & E. 438, 446, 52 R. R. 400.

(*y*) Cp. Langdell, op. cit. § 91.

(*z*) *Roscorla v. Thomas* (1842) 3 Q. B. 324, Finch Sel. Ca. 340.

(*a*) "It is not reasonable that one man should do another a kindness, and then charge him with a

recompense." 1 Wms. Saund. 356.

(*b*) *Lampleigh v. Brathwait* (1616) Hob. 105, and 1 Sm. L. C.; see per Erle C.J. 13 C. B. N. S. at p. 740. The Irish case of *Bradford v. Roulston* (1858) 8 Ir. C. L. Rep. 468, will, for English lawyers at least, hardly outweigh this dictum; and the doctrine would seem to be open to examination in the C. A., see per Bowen L.J. *Stewart v. Casey* [1892] 1 Ch. at p. 115, 61 L. J. Ch. 61. See Anson, pp. 102-110, and cp. Clark Hare on Contracts, 246-249. At an earlier time it was held that a past consideration would not

Performance of another's legal duty.

also said that the voluntary doing by one party of something which the other was legally bound to do is a good consideration for a subsequent promise of recompense. But the authority for this proposition is likewise found to be unsatisfactory. Not only is it scanty in quantity, but the decisions, so far as they did not proceed on the now exploded ground that moral obligation is a sufficient consideration, appear to rest on facts establishing an actual tacit contract independent of any subsequent promise.

Acknowledgment of barred debts.

Another exceptional or apparently exceptional case which certainly exists is that of a debt barred by the Statute of Limitation, on which the remedy may be restored by a new promise on the debtor's part. It is said that the legal remedy is lost but the debt is not destroyed, and the debt subsisting in this dormant condition is a good consideration for a new promise to pay it. This is not logically satisfying, and in fact it belongs to the now discredited view of past consideration. There is no real equivalent for the new promise, and the only motive that can generally be assigned for it is the feeling that it would be morally wrong not to pay. It seems better at this day to say that the law of limitation does not belong to substantive law at all, but is a special rule of procedure made in favour of the debtor, who may waive its protection if he deliberately chooses to do so (c).

Mutual promises.

The most characteristic rule in our law of consideration, and the most important for the business of life, is that mutual promises are sufficient consideration for one another. When the subject was still novel it would not have been difficult, one would think, to frame plausible

support an action of debt, but was enough for assumpsit, *Marsh v. Rainsford* (1588) 2 Leon. 111; *Sidenham v. Worlington* (1595) *ib.* 224; Finch Sel. Ca. 337; O. W. Holmes, *The Common Law*, 286, 297. The theory was still that the breach of promise was an actionable wrong because of an existing relation between the parties which

created a special duty, not that an executory contract, as such, created an obligation; and on that theory there was no reason why the promise and the consideration should be simultaneous. But Lord Mansfield cannot be supposed to have known anything of this.

(c) See more on this point in Ch. XIII.

arguments to the contrary. However, there is very little trace of opposition to it in our books. As early as 1555, the validity of reciprocal promises passed without question in a case reported on another point (*d*). In 1615 it was disputed (we are not told on what grounds), and finally affirmed (*e*). The promises must be exchanged for one another at the same time (*e*), and each of them must be binding on the face of it, that is, must not be unenforceable for any intrinsic reason. A promise which purports to be merely honorary, or which is invalidated by any rule of general policy or special provision of positive law, is no consideration (*f*). It is true that the promise itself, not the obligation thereby created, is the consideration (*g*); still, the value of a promise does not consist in the act of promising, any more than the value of a negotiable instrument consists in a piece of paper with writing on it, but in the assurance of the performance to which the promisor obliges himself, or, at worst, of damages for his default. A promise may be incapable of being sued on (*gg*), and therefore incapable of being a consideration for a

(*d*) *Pecke v. Redman*, Dyer, 113.

(*e*) *Nichols v. Raynbred*, Hobart, 88, Finch Sel. Ca. 336. "Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him fifty shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will be both *nuda pacta*." See intermediate cases collected by Prof. Ames in Harv. Law Rev. xiii. 32, n.

(*f*) *Harrison v. Cage*, 5 Mod. 411; Langdell, "Mutual Promises as a Consideration for each other," Harv. Law Rev. xiv. 496, 504.

(*g*) Ames, "Two Theories of Consideration," Harv. Law Rev. xiii. 29, 32. But when Prof. Ames

suggests, at p. 34, that a promise which is and is known to be merely honorary may be a good consideration, he seems to overlook the undisputed authority of *Harrison v. Cage* (last note). Certainly some men's honorary promises are in fact worth more than some men's legal promises, but the law cannot estimate or regard this. Chief Justice O. W. Holmes, on the other hand, suggests that every legal promise is really in the alternative to perform or to pay damages: which can only be regarded as a brilliant paradox. It is inconsistent not only with the existence of equitable remedies, but with the modern common law doctrine that premature refusal to perform may be treated at once as a breach. See 163 U.S. at p. 600; Harriman, § 552.

(*gg*) In many cases a promise may be actionable though not capable, in fact or in law, of performance.

counter-promise, for various reasons which we have examined or shall examine under their proper heads. Such reasons do not form part of the doctrine of Consideration, as is shown by the fact that the same or similar reasons exist and are applied in the modern Roman law and national bodies of law derived from it, where the Common Law rules of Consideration are unknown (*h*). In many cases a promisor has the option of avoiding his contract for some cause existing at the date of the promise. But in all such cases the contract is valid until rescinded, and the right to rescind it may be lost by events beyond the promisor's control; so there is no difficulty in treating his promise as a good consideration.

Certainty
required.

Since a promise which is to be a good consideration for a reciprocal promise must be such as can be enforced, it must be not only lawful but reasonably definite. Thus a promise by a son to his father to leave off making complaints of the father's conduct in family affairs is no good consideration to support an accord and satisfaction, for it is too vague to be enforced (*i*). And upon a conveyance of real estate without any pecuniary consideration a covenant by the grantee to build on the land granted such a dwelling-house as he or his heirs shall think proper is too vague to save the conveyance from being voluntary within 27 Eliz. c. 4 (*k*).

Promises
of a thing
one is
already
bound
generally
or to the
promisee
to do.

Similarly, neither the promise to do a thing nor the actual doing of it will be a good consideration if it is a thing which the party is already bound to do either by the general law or by a subsisting contract with the other party (*l*). It seems obvious that an express promise by

(*h*) Thus the question of the performance being possible is irrelevant here. In any case the language of 2 Wms. Saund. 430 and of the dicta there relied on is much too wide.

(*i*) *White v. Bluett* (1853) 23 L. J. Ex. 36; this seems the *ratio decidendi*, though so expressed only by Parke B., who asked in the course of argument, "Is an agreement by a father in consideration that his

son will not bore him a binding contract?"

(*k*) *Rosher v. Williams* (1875) L. R. 20 Eq. 210, 44 L. J. Ch. 419.

(*l*) See Leake, 538; and besides authorities there given, *Deacon v. Gridley* (1854) 15 C. B. 295, 24 L. J. C. P. 17; and the judgment on the 7th plea in *Mallalieu v. Hodgson* (1851) 16 Q. B. 689, 20 L. J. Q. B. 339.

A. to B. to do something which B. can already call on him to do can in contemplation of law produce no fresh advantage to B. or detriment to A. (*m*). But the doing or undertaking of anything beyond what one is already bound to do, though of the same kind and in the same transaction, is a good consideration. A promise of reward to a constable for rendering services beyond his ordinary duty in the discovery of an offender is binding (*n*): so is a promise of extra pay to a ship's crew for continuing a voyage after the number of hands has been so reduced by accident as to make the voyage unsafe, so that the crew are not bound to proceed under their original articles (*o*). So, it is conceived, would be a promise in consideration of the promisee doing at a particular time, or in a particular way, something which otherwise he must do, but has the choice of doing in more than one way, or at any time within certain limits. Again, there will be consideration enough for the promise if an existing right is altered or increased remedies given. Thus an agreement to give a debtor time in consideration of his paying the same interest that the debt already carries is inoperative, but an agreement to give time or accept reduced interest in consideration of having some new security would be good and binding. The common proviso in mortgages for reduction of interest on punctual payment—*i. e.*, payment at the very time at which the mortgagor has covenanted to pay it—seems to be without any consideration, and it is conceived that if not under seal such a proviso could not be enforced (*p*). Again, the rule does not apply if the promise is in the nature of a compromise, that is, if a reasonable doubt exists at the time whether the thing

(*m*) Some American courts, however, hold otherwise: Harriman on Contracts, § 117.

(*n*) *England v. Davidson* (1840) 11 A. & E. 856, 52 R. R. 522.

(*o*) *Hartley v. Ponsonby* (1857) 7

E. & B. 872, 26 L. J. Q. B. 322.

(*p*) This could be at once provided against, however, if so desired, by fixing the times for "punctual payment" a single day earlier than those named in the mortgagor's covenant.

promised be already otherwise due or not, though it should be afterwards ascertained that it was so. We shall return to this when we speak of forbearance as a consideration.

Perform-
ance of
subsisting
obligation
to third
person.

Difficult questions arise when we have a promise made in consideration of the promisee doing or promising to do something which a subsisting contract with a third person has already bound him to do. Such cases are not frequent, and there has not yet been any full or satisfying judicial discussion of them. It would seem that, being infrequent and of no great importance in current affairs, they should be disposed of by the strict application of settled principles, and that, even if such application should lead to apparently fine distinctions, the principles ought not to be tampered with merely to avoid that result. From this point of view, Andrew's performance of his binding promise to Peter does not appear capable of being a consideration for a new promise by John to Andrew; not because it cannot be beneficial to John, for this it may very well be, but because in contemplation of law the performance is no new detriment to Andrew, but on the contrary is beneficial to him, inasmuch as it discharges him of an existing obligation. Therefore the necessary element of detriment to the promisee is wanting (*q*). It seems therefore that if a promise is given in exchange merely for the performance of the promisee's duty under an existing contract with a third person, it is not binding. Authority, however, is the other way so far as it goes. Performance of this kind has been held a sufficient consideration in at least three English reported cases (*r*), one from the early seventeenth and two from the middle part

(*q*) In point of fact there may be some, for it may be that he might have omitted the performance with impunity. But this is like the case of a merely honorary promise. The law is made to fit the normal conditions of men's affairs. If every man's word were as good as his

bond, or nobody cared to enforce his rights, there would be no place for any law of contract at all.

(*r*) The point might perhaps have been considered in *Jones v. Waite* (1839, 1842) 5 Bing. N. C. 341, 9 Cl. & F. 88, 50 R. R. 705, 717, but the argument and decision were on other grounds.

of the nineteenth century. In the first of these (*s*) the plaintiff and defendant were jointly liable as sureties on a bond, long before the modern equitable doctrine of contribution between co-sureties was established. In consideration of the plaintiff paying the whole debt, the defendant promised to repay him half. The promise was held binding, but the real difficulty does not appear to have been dealt with (*t*). In the second case (*u*) the plaintiff, being engaged to be married, did (on the facts as assumed) proceed with the marriage on the faith of a promise by his uncle, the defendant's testator, to pay him an annuity during the promisor's life. The plaintiff succeeded in an action for arrears of the annuity. To the majority of the Court it appeared sufficient to say that the marriage took place at the testator's request. But this (whether rightly said or not) does not answer the question whether the simple fulfilment of a promise of marriage already binding on him could be any legal detriment to the promisee. The third case (*x*), in an entirely different subject-matter, also goes on the ground of the performance being, in point of fact, both a benefit to the promisor and a detriment to the promisee. Here the defendant's promise was to unload a cargo of coal at a certain rate in consideration of the plaintiff delivering the coal to him, which the plaintiff was already bound to do under a prior contract with the shippers of the coal, from whom the defendant had bought it. There is a suggestion in the course of the argument that the performance requested by

(*s*) *Bagge v. Slade* (1616) 3 Bulst. 162. This decision was apparently forgotten until Prof. Ames lately called attention to it.

(*t*) It is certainly not touched by the statement, perfectly correct in itself, of Dodderidge J.: "If the consideration puts the other to charge, though it be no ways at all profitable to him who made the promise, yet this shall be a good consideration to raise a promise."

(*u*) *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159, 30 L. J. C. P. 145, Byles J. *diss.* chiefly on the ground that there was really no *animus contrahendi*, but only an act of bounty, *cp.* Langdell, § 68. If there were any *animus contrahendi*, an acceleration of the marriage at the testator's request would no doubt have made a good consideration, but that was not averred.

(*x*) *Scotson v. Pegg* (1861) 6 H. & N. 295, 30 L. J. Ex. 225.

the defendant may have added new terms, as to time and manner of delivery, to that which the plaintiff was already bound to do, and it may be that the plaintiff was entitled to succeed on that point, if properly raised. But there is nothing of the kind in the judgment. It seems to be assumed that the rule must be the same whether the consideration relied upon is a performance already due to a third party or a new promise thereof to the defendant. And so the Supreme Court of Massachusetts has thought only a few years ago (*y*). The validity of this assumption must, however, be examined.

Promise to perform obligation to third person under subsisting contract.

Let us now take the case of a promise by John to Peter to do something which he has already promised William to do. Such a promise may obviously create a moral obligation; for Peter may in many ways have a just and reasonable interest in being assured that John will perform his contract with William. Then is there any reason why it should not create a legal obligation, if supported by a sufficient consideration on Peter's part? The promise is a new and distinct promise, creating, on the face of it, a new and distinct duty to a new party. Duties to several parties to perform the same thing are simultaneously created in many quite common forms of covenants. Why should they not be created by successive and independent acts? Will any one deny that John's promise to Peter will be binding if given in exchange for a performance—say immediate payment of money—by Peter? If it is not, this must be the result of some special rule of legal policy, for no other objection seems possible. But of any such rule of policy there is no trace. If then the promise is binding when given for a performance, why should it be less binding when it is given in exchange for Peter's promise? There is no reason in the nature of the case for making any difference. If there were a positive rule of law, founded on reasons of policy, for not allowing John's promise to Peter to perform his contract with

(*y*) *Abbott v. Doane* (1895) 163 Mass. 433.

William to be good, then John's promise would be no consideration; but only because, even though supported by sufficient consideration on the other side and satisfying all ordinary requisites, it was deprived of validity by the positive rule, and therefore made incapable of having any value in contemplation of law. But again, no such positive rule can be produced. It has been said that John's promise is a good consideration only if it is binding, and we have no right to assume that it is binding. The answer to this objection is that, if John's promise can be binding, it is made so by the counter-promise, and it is for the objector to show that it cannot be. The objection, in truth, if good for anything, is equally good to prevent mutual promises from ever being a consideration for each other; for in every such case neither promise, taken by itself, is of any legal force or value (z).

There is no objection, in any case, to a promise by John to Peter not to rescind a subsisting contract with William, or not to accept a waiver or release of it; and a promise in that form would certainly be a good consideration.

No direct decision has been made in England on the validity of a promise to perform an existing contract with a third person. A negative solution could not be given, it is apprehended, without overruling the cases in which performance has been held sufficient; while a positive one, if the argument above submitted be sound, might be given for independent reasons. Not that I am at all desirous of upholding the authority of the cases in question. I venture to submit, on the contrary, that they were wrongly decided, or at any rate not on right grounds. What is

(z) Prof. Williston, upholding the objection originally raised by Sir W. Anson (now at p. 98 of his 9th ed.), perceived this, and proposed to meet the difficulty by constructing an entirely new theory of mutual promises: Harv. Law Rev. viii. 27. Mr. Langdell has dealt with the objection, and the theory founded on it, in a masterly reply:

Harv. Law Rev. xiv. 496. Prof. Ames (Harv. Law Rev. xii. 515, xiii. 29, 35) holds, on the contrary, that both promise and performance are good consideration in cases of this class; but this involves the proposition that any detriment *in fact* to the promisee will do, which I cannot accept. Prof. Harriman (on Contracts, p. 67) appears to agree with Prof. Ames.

here maintained is that a promise made for valuable consideration, and otherwise good as between the parties, is not the less valid because the performance will operate in discharge of an independent liability of the promisor to a third person under an independent contract already existing.

Rules as to consideration extended to the discharge of contracts.

The doctrine of Consideration has been extended with not very happy results beyond its proper scope, which is to govern the formation of contracts, and has been made to regulate and restrain the discharge of contracts. For example, where there is a contract of hiring with a stipulation that the wages due shall be forfeited in the event of the servant being drunk, a promise not under seal to pay the wages notwithstanding a forfeiture is not binding without a new consideration (a). It is the rule of English law (now referred to the same reason, though really older) (b) that a debt of 100*l.* may be perfectly well discharged by the creditor's acceptance of a beaver hat or a peppercorn, or of a negotiable instrument for a less sum (c), at the same time and place at which the 100*l.* are payable, or of ten shillings at an earlier day or at another place, but that nothing less than a release under seal will make his acceptance of 99*l.* in money at the same time and place a good discharge (d) : although modern decisions have confined this absurdity within the narrowest possible limits (e). A judgment creditor agreed in writing with the debtor to take no proceedings on the judgment in consideration of immediate payment of part of the debt and payment of the residue by certain instalments ; here there was no legal consideration for the creditor's promise, and he was entitled

(a) *Monkman v. Shepherdson* (1840) 11 A. & E. 411, 52 R. R. 390.

(b) See Harv. Law Rev. xii. 521.

(c) *Goddard v. O'Brien* (1882) 9 Q. B. D. 37 ; *Bidder v. Bridges* (1887) 37 Ch. Div. 406, 57 L. J. Ch. 300.

(d) *Pinnel's case* (1602) 5 Co. Rep. 117, confirmed with reluctance by the House of Lords in *Foakes v. Beer* (1884) 9 App. Ca. 605, 54 L. J. Q. B. 130, Lord Blackburn

all but dissenting. The Indian Contract Act (s. 63, illust. b.) is accordingly careful to express the contrary. The rule in *Pinnel's case*, it may be noted, though paradoxical, is not anomalous. Its numerical logic may be archaic, but it is strictly logical. The Court does not know judicially what a beaver hat may be worth, but it must know that 10*l.* are not worth 20*l.*

(e) See the notes to *Cumber v. Wane* (1719) in 1 Sm. L. C.

to claim interest on the debt though the whole of the principal was paid according to the agreement (*f*). This rule does not touch the ordinary case of a composition between a debtor and several creditors; for every creditor undertakes to accept the composition in consideration of the like undertaking of the other creditors as well as of the debtor's promise to pay it (*g*).

If it is agreed between creditor and debtor that the duty shall be performed in some particular way different from that originally intended, this may well be binding: for the debtor's undertaking to do something different though only in detail from what he at first undertook to do, or even relinquishing an option of doing it in more ways than one, would be consideration enough, and the Court could not go into the question whether it gave any actual advantage to the creditor. But if the new agreement amounts to saying that the debtor shall at his own option perform the duty as at first agreed upon or in some other way, it cannot be binding without a new consideration: as where an entire sum is due, and there is an agreement to accept payment by instalments, this would be good, it seems, if the debtor undertook not to tender the whole sum; but in the absence of anything to show such an undertaking, the agreement is a mere voluntary indulgence, and the creditor remains no less at liberty to demand the whole sum than the debtor is to pay it (*h*).

The consideration for variation of contracts.

The loss or abandonment of any right, or the forbearance to exercise it for a definite or ascertainable time, is for obvious reasons as good a consideration as actually doing something. In *Mather v. Lord Maidstone* (*i*) the loss of

Loss or forbearance of rights as consideration.

(*f*) *Foakes v. Beer* (1884) 9 App. Ca. 605, 44 L. J. Q. B. 130, foll. in *Underwood v. Underwood* [1894] P. 204, 63 L. J. P. 109. But where the solicitor of a defendant entitled to taxed costs accepted from the plaintiff's solicitor a cheque for the amount of costs (nothing being said about interest), this was held to be an accord and satisfaction for everything due, and the de-

fendant was not allowed to issue execution for the interest: *Bidder v. Bridges* (1887) 37 Ch. Div. 406, 57 L. J. Ch. 300.

(*g*) *Good v. Cheesman* (1831) 2 B. & Ad. 328, Finch Sel. Ca. 343, 36 R. R. 574.

(*h*) *McManus v. Bark* (1870) L. R. 5 Ex. 65, 39 L. J. Ex. 65. Cp. *Foakes v. Beer*, note (*d*), last page.

(*i*) (1856) 18 C. B. 273, 25 L. J. C. P. 310.

collateral rights by the promisee supported a promise notwithstanding that the main part of the consideration failed. The action was on a bill of exchange. This bill was given and endorsed to the plaintiff as in renewal of another bill purporting to be accepted by the defendant and endorsed to the plaintiff. The plaintiff gave up this first bill to the defendant; thirty days afterwards it was discovered that it was not really signed by the defendant: yet it was held that he was liable on the second bill, for the plaintiff had lost his remedy against the other parties to the first bill during the time for which he had parted with the possession of it, and that was consideration enough.

Forbearance to sue: must be for definite or ascertainable time.

As to forbearance, the commonest case of this kind of consideration is forbearing to sue. Forbearance for a reasonable time is enough, on the principle of *certum reddi potest*: and terms in themselves vague, such as "forbearing to press for immediate payment," may be construed by help of the circumstances and context as meaning forbearance for a reasonable time. A promise to guarantee a debt if the creditor will give time to the principal debtor is in the first instance an offer; it becomes a binding promise when the condition of giving the specified time, or a reasonable time, has been performed. It is a question of fact what is reasonable time in a given case (*k*).

There must be an actual or *bona fide* disputed right.

That which is forborne must also be the exercise or enforcement of some legal or equitable right which is honestly believed to exist. This is simply the converse of a rule already given. As a promise by A. to B. is naught

(*k*) *Oldershaw v. King* (1857) (Ex. Ch.) 2 H. & N. 517, 27 L. J. Ex. 120, and see 1 Wms. Saund. 225. In *Alliance Bank v. Broom* (1864) 2 Dr. & Sm. 289, 34 L. J. Ch. 956, actual forbearance at the defendant's request, though not for any specified time, was held sufficient. Cp. *Wilby v. Elgee* (1875) L. R. C. P. 497. In *Crears v. Hunter* (1887) 19 Q. B. Div. 341, 56 L. J. Q. B. 518, which has been criticized as ambiguous, L. Q. R. iii. 484, it must be taken, with the

head-note, that the consideration was actual forbearance. The promise being in the form of a promissory note, *i.e.*, essentially unconditional, certainly makes a difficulty, for it would seem there was a complete promise before the consideration, *viz.* forbearing to sue for a reasonable time, was or could be executed. On the principle see per Bowen L.J. in *Miles v. New Zealand Alford Estate Co.* (1885-6) 32 Ch. Div. at p. 289.

if it is only a promise to do something A. is already bound, either absolutely or as against B., to do, so it is equally worthless if it is a promise not to do something which B. can already, as a matter either of public or of private right, forbid A. to do. So far we assume the existing rights of the parties to be known: but as in practice they often are not known, but depend on questions of law or of fact, or both, which could not be settled without considerable trouble, common sense and convenience require that compromises of doubtful rights should be recognized as binding, and they constantly are so recognized. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value" (l); and such forbearance is good consideration for a promise even though the claim is not well founded, provided it is honestly believed in and the promisee does not conceal from the promisor any fact which to his knowledge would affect its validity (m).

Why compromises are binding.

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (n). The same rule applies in the case where the claim given up is on a disputed promise of marriage (o). A partial compromise in which the undertaking is not simply to stay or not to commence legal proceedings, but to conduct them in some particular manner or limit them to some particular object, may well be good: but here again the forbearance must relate to something within the proper scope of such proceedings. A promise to conduct proceedings in bankruptcy so as to injure the debtor's

Srinagar.

Advocate High Court
Jammu & Kashmir

(l) *Miles v. New Zealand Alford Estate Co.* (1885-6) 32 Ch. Div. 266, Bowen L.J. at p. 291, reviewing previous cases and dicta.

(m) Cotton L.J. *ib.* at p. 284.

(n) *Trigge v. Lavallée* (1864) 15

Moo. P. C. 271, 292 (a case from Lower Canada, then under old Fr. law). *Wilby v. Elgee* (1875) L. R. 10 C. P. 497, 44 L. J. C. P. 254.

(o) *Keenan v. Handley* (1864) 2 D. J. S. 283.

credit as little as possible is no consideration, for it is in truth merely a promise not to abuse the process of the Court (*p*).

Reaction
of the
general
doctrine of
Considera-
tion on
contracts
under seal.

The main end and use of the doctrine of Consideration in our modern law is to furnish us with a comprehensive set of rules which can be applied to all informal contracts without distinction of their character or subject-matter. Formal contracts remain, strictly speaking, outside the scope of these rules, which were not made for them, and for whose help they had no need. But it was impossible that so general and so useful a legal conception as that of Consideration should not make its way into the treatment of formal contracts, though with a different aspect. The ancient validity of formal contracts could not be amplified, but it might be restrained: and in fact both the case-law and the legislation of modern times show a marked tendency to cut short if not to abolish their distinctive privileges, and to extend to them as much as possible the free and rational treatment of legal questions which has been developed in modern times by the full recognition of informal transactions.

Most con-
spicuous
in Equity.

This result is mainly due to the action of the Court of Chancery. A merely gratuitous contract under seal is enforceable at common law (with some peculiar exceptions) unless it can be shown that behind the apparently gratuitous obligation there is in fact an unlawful or immoral consideration. Courts of equity did not, in the absence of any special ground of invalidity, interfere with the legal effect of formal instruments: but they would not extend their special protection and their special remedies to agreements, however formal, made without consideration. A voluntary covenant, though under seal, "in equity, where at least the covenantor is living (*q*), or where

(*p*) *Bracewell v. Williams* (1866)
L. R. 2 C. P. 196.

(*q*) We shall see under the head
of undue influence that a system of

specific performance of such a covenant is sought, . . . stands scarcely, or not at all, on a better footing than if it were contained in an instrument unsealed" (r). And this restriction is not affected by the union of legal and equitable jurisdiction in the High Court of Justice. The rule that a court of equity will not grant specific performance of a gratuitous contract is so well settled that it is needless to cite further authorities for it: and it is not to be overlooked that whereas the other rules that limit the application of this peculiar remedy are of a more or less discretionary kind, and founded on motives of convenience and the practical requirements of procedure rather than on legal principle, this is an absolute and unqualified rule which must be considered as part of the substantive law.

No specific performance of voluntary agreement though by deed.

It is the practice of equity, however, at all events when the want of consideration is actively put forward as an objection (and the practice must be the same, it is conceived, when the objection is made by way of defence in an action for specific performance), to admit evidence of an agreement under seal being in fact founded on good consideration, where the deed expresses a nominal consideration (s) or no consideration at all (t), though (save in a case of fraud or illegality) a consideration actually inconsistent with that expressed in the deed could probably not be shown (s).

But existence of consideration may be shown *aliunde*.

Closely connected with this in principle is the rule of equity that, although no consideration is required for the validity of a complete declaration of trust (u), or a complete transfer of any legal or equitable interest in property, yet an incomplete voluntary gift creates no right which can be

Equity will not give effect to imperfect gifts.

presumptions has been established which makes it difficult in many cases for persons claiming under a voluntary deed to uphold its validity if the donor, or even his representatives, choose within any reasonable time afterwards to dispute it.

(r) Per Knight Bruce L.J. *Keke-wich v. Manning* (1851) 1 D. M. G.

176, 188.

(s) *Leifchild's case* (1865) L. R. 1 Eq. 231.

(t) *Llanelly Ry. and Dock Co. v. L. & N. W. Ry. Co.* (1873) L. R. 8 Ch. 942.

(u) *Qu.* whether this was originally right on principle.

enforced. Thus a voluntary parol gift of an equitable mortgagee's security is not enforceable ; and, since his interest in the deeds deposited with him, where the mortgage is by deposit, is merely incidental to his security, delivery of such deeds by the mortgagee to his donee makes no difference, and does not entitle the donee to retain them against the mortgagee's representatives (*x*). Certain modern decisions have indeed shown a tendency to infringe on this rule by construing the circumstances of an incomplete act of bounty into a declaration of trust, notwithstanding that the real intention of the donor was evidently not to make himself a trustee, but to divest himself of all his interest (*y*). But these have been disapproved in still later judgments which seem entitled to more weight (*z*).

(*x*) *Shillito v. Hobson* (1885) 30 Ch. Div. 396, 55 L. J. Ch. 741. The delivery over seems to be a trespass against the depositor.

(*y*) *Richardson v. Richardson* (1867) L. R. 3 Eq. 686, 36 L. J. Ch. 653 ; *Morgan v. Malleson* (1870) L. R. 10 Eq. 475, 39 L. J. Ch. 680.

(*z*) *Warriner v. Rogers* (1873)

L. R. 16 Eq. 340, 42 L. J. Ch. 581 ; *Richards v. Delbridge* (1874) L. R. 18 Eq. 11, 43 L. J. Ch. 459 ; *Moore v. Moore* (1874) L. R. 18 Eq. 474, 43 L. J. Ch. 617 ; *Heartley v. Nicholson* (1874) L. R. 19 Eq. 233, 44 L. J. Ch. 277. Cp. *Breton v. Woollven* (1881) 17 Ch. D. at p. 420, 50 L. J. Ch. 369.

CHAPTER V.

PERSONS AFFECTED BY CONTRACT.

General Rules as to Parties.

THE original and simplest type of contract is an agreement creating an obligation between certain persons. The persons are ascertained by their description as individuals, and not by their satisfying any general class description: or, more shortly, they are denoted by proper names and not by class names (*a*). And the persons who become parties in the obligation created by the agreement are the persons who actually conclude the agreement in the first instance, and those only. The object of this chapter will be to point out the extent to which modern developments of the law of contract have altered this primary type either by modifications co-extensive with the whole range of contract or by special classes of exceptions.

Original
type of
contract.

The fundamental notion from which we must take our departure is one that our own system of law has in common with the Roman system and the modern law of other civilized countries derived therefrom. A wide statement of it may be given in the shape of a maxim thus:

The legal effects of a contract are confined to the contracting parties.

Legal
effects
confined to
contract-
ing
parties.

(*a*) Savigny, *Obl.* § 53 (2. 16), generally, *ib.* §§ 53-70, pp. 17-186.
cp. on the subject of this chapter

This maxim to be developed.

the particulars from which it is generalized, and cannot be understood except by reference to those particulars. The first step towards the necessary development may be given in a series of more definite but still very general rules, which we shall now endeavour to state, embodying at the same time those qualifications, whether of recent introduction or not, which admit of being stated in an equally general form.

Definitions.

It will be convenient to use certain terms in extended or special senses. A contract creates an obligation between the contracting parties, consisting of duties on the one part and the right to demand the performance of them on the other.

“Creditor” and “debtor.”

Any party to a contract, so far as he becomes entitled to have anything performed under the contract, is called the creditor. So far as he becomes bound to perform anything under the contract he is called the debtor.

“Representation.”

Representation, representatives, mean respectively succession and the person or persons succeeding to the general rights and liabilities of any person in respect of contracts, whether by reason of the death of that person or otherwise.

“Third person.”

A *third person* means any person other than one of the parties to the contract or his representatives (*b*).

Rules.
Parties.

Rules. 1. The original parties to a contract must be persons ascertained at the time when the contract is made.

Third persons not bound.

2. The creditor can demand performance from the debtor or his representatives. He cannot demand nor can the debtor require him to accept performance from any third person; but the debtor or his representatives may perform the duty by an agent.

(*b*) Contracts for the sale of land are enforceable in equity by and against the heirs or devisees of the

parties. But here the obligation is treated as attached to the particular property.

3. A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract. Third person not entitled.

This is subject to an *exception* as to provisions contained in a settlement made upon and in consideration of marriage for the benefit of children to be born of the marriage (c).

4. Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract. Assignment.

Explanation 1. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged. Notice to debtor.

Explanation 2. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor to the benefit of any defence which he might have had against the creditor himself. Equities.

The following exceptions given here in order to complete the general statement are connected in principle with the cases of a contract for personal services or the exercise of personal skill becoming impossible of performance by inevitable accident, of which we speak in Chapter VIII. below.

Exception 1. If it appears to have been the intention of the parties that the debtor should perform any duty in person, he cannot perform it by an agent, nor can performance of it be required from his representatives. Such an intention is presumed in the case of any duty which involves personal confidence between the parties, or the exercise of the debtor's personal skill. Exceptions: Strictly personal duties.

(c) See p. 210, below.

Strictly
personal
rights.

Exception 2. If it appears to have been the intention of the parties that only the creditor in person should be entitled to have any duty performed, no one can become entitled by representation or assignment to demand the performance of it, nor can such performance be required from the debtor's representatives.

Such an intention is presumed if the nature of the transaction involves personal confidence between the parties, or is otherwise such that "personal considerations" are of the foundation of the contract (*d*).

Exception 3. The representatives of a deceased person cannot sue for a breach of contract in a case where the breach of contract was in itself a merely personal injury, unless special damage to the estate which they represent has resulted from the breach of contract. But where such damage has resulted the representatives may recover compensation for it, notwithstanding that the person whose estate they represent might in his lifetime have brought an action of tort for the personal injury resulting from the same act (*e*).

These propositions are subject to several special qualifications and exceptions. Most of the exceptions are of

(*d*) Cp. Indian Contract Act, ss. 37, 40. See *Stevens v. Benning* (1854) 1 K. & J. 168, 24 L. J. Ch. 153; *Farrow v. Wilson* (1869) L. R. 4 C. P. 744, 746, 38 L. J. C. P. 326; *Robinson v. Davison* (1871) L. R. 6 Ex. 269, 40 L. J. Ex. 172; *Finlay v. Chirney* (1888) 20 Q. B. Div. 494, 57 L. J. Q. B. 247; *Robson v. Drummond* (1831) 2 B. & Ad. 303, 36 R. R. 569; but this case goes very far: *British Waggon Co. v. Lea & Co.* (1880) 5 Q. B. D. 149, 152, 49 L. J. Q. B. 321, and will not be extended: *Phillips v. Hull Alhambra Palace Co.* [1901] 1 Q. B. 59, 70 L. J. Q. B. 26. An assignment which would impose a novel burden on the debtor is not binding on him: *Tolhurst v. Asso-*

ciated Portland Cement Manufacturers [1901] 2 K. B. 811, 70 L. J. K. B. 1036. If in any of these cases the transaction is continued by mutual consent, it is a new contract, *e.g.*, if a servant continues his service with a deceased master's family, or if a painter's executor, being also a painter, were to complete an unfinished portrait on the original terms at the sitter's request.

(*e*) See 1 Wms. Exors. 709, 9th ed., and *Bradshaw v. Lancashire & Yorkshire Ry. Co.* (1875) L. R. 10 C. P. 189, 44 L. J. C. P. 148 (since questioned in *Leggott v. G. N. Ry. Co.* (1876) 1 Q. B. D. 599, 45 L. J. Q. B. 557).

modern origin, and we shall see that since their establishment many attempts have been made to extend them. Such attempts have in some departments been successful, while in others exceptions which for some time were admitted have been more recently disallowed.

We shall now go through the rules thus stated in order, pointing out under each the limits within which exceptions are admitted in the present state of the law. The decisions which limit the exceptions are (as commonly happens in our books) for the most part the chief authorities to show the existence of the rules.

Our first rule is that *the original parties to a contract must be persons ascertained at the time when the contract is made*. It is obvious that there cannot be a contract without at least one ascertained party to make it in the first instance; and it is also an elementary principle of law that a contracting party cannot bind himself by a floating obligation to a person unascertained. The rule has been thus expressed: "A party cannot have an agreement with the whole world; he must have some person with whom the contract is made" (*f*). It is theoretically possible to find exceptions to this rule in such cases as those of promises or undertakings addressed to the public at large by advertisements or the like, and sales by auction. But we have shown in Chap. I. that this view is unnecessary and untenable, and that in every such case where a contract is formed it is formed between two ascertained persons by one of them accepting a proposal made to him by the other, though possibly made to him in common with all other persons to whose knowledge it may come.

Rule 1.
Parties
must be
ascertained.

No real
exceptions.

Effects of Contract as to Third Persons.

The affirmative part of our second rule, namely: *The creditor can demand performance from the debtor or his*

(*f*) *Squire v. Whitton* (1848) 1 H. L. C. 333, 358.

representatives, is now and long has been, though it was not always elementary (*g*).

Rule 2.
No liability imposed on third persons.

The negative part of it states that *the creditor cannot demand, nor can the debtor require him to accept, performance from any third person*. This is subject to the explanation that the debtor or his representatives may perform the duty by an agent, which again is modified by the exception of strictly personal contracts as mentioned at the end of the rules. On this we need not dwell at present.

Its foundation in principle.

It is obvious on principle that it is not competent to contracting parties to impose liabilities on other persons without their consent.

Every person not subject to any legal incapacity may dispose freely of his actions and property within the limits allowed by the general law. Liability on a contract consists in a further limitation of this disposing power by a voluntary act of the party which places some definite portion of that power at the command of the other party to the contract. So much of the debtor's individual freedom

(*g*) As to the liability of personal representatives on the contracts of the testator or intestate see 1 Wms. Saund. 241-2. The old rule that an action of *debt* on simple contract would not lie against executors where the testator could have waged his law (though it is said the objection could be taken only by demurrer) seems to have been in truth an innovation. See the form of writ for or against executors, Fleta 1. 2, c. 62, § 9; and cp. F. N. B. 119 M, 121 O (the latter passage is curious: if a man has entered into religion his executors shall be sued for his debt, not the abbot who accepted him into religion: see p. 83, n. (z), *supra*, and Y. B. 30 Ed. I. p. 238. It is said, however, that "*Quia executores non possunt facere legem pro defuncto,*

petens probabit talliam suam, vel si habeat sectam secta debet examinari; et hoc est verum sive sit mercator sive non": Y. B. 22 Ed. I. p. 456). For the conflict of opinion as to the remedy by *assumpsit*, see Reeves 3. 403, Y. B. Mich. 2 H. VIII. 11, pl. 3, the strange dictum *contra* of Fitzherbert, Trin. 27 H. VIII. 23, pl. 21, who said there was no remedy at all (apparently on the ground that a cause of action in *assumpsit* was for a tort, and therefore died with the defendant's person), and *Norwood v. Read* (1557-8) in B. R., Plow. 180. In *Pinchon's case* (1612) in Ex. Ch. 9 Co. Rep. 86 *b*, this dictum was overruled, authorities reviewed and explained, and the common law settled in substance as it now is.

is taken from him and made over to the creditor (*h*). When there is an obligation independent of contract, a similar result is produced without regard to the will of the party; the liability is annexed by law to some wrongful act or default in the case of tort, and in the case of contracts "implied in law" to another class of events which may be roughly described as involving the accession of benefit through the involuntary loss of another person; but when an obligation is founded upon a real contract, the assent of a person to be bound is at the root of the matter and is indispensable (*i*).

The ordinary doctrines of agency form no real exception to this. For a contract made by an agent can bind the principal only by force of a previous authority or subsequent ratification; and that authority or ratification is nothing else than the assent of the principal to be bound, and the contract which binds him is his own contract. Under certain conditions there may be a contract binding on the agent also, as we have seen in Chap. II., but with that we are not here concerned. Another less simple apparent exception occurs in the cases in which companies have been held bound by agreements or representations (*k*) made by their promoters before the companies had any legal existence. These cases, however, proceed partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation (*l*), partly on a ground independent of con-

Agency: the exception only apparent.

When companies held in equity to promoters' agreements; not *ex contractu*.

(*h*) Cp. Savigny, Obl. § 2.

(*i*) *Lumley v. Gye* (1853) 2 E. & B. 216, 22 L. J. Q. B. 463, and *Bowen v. Hall* (1881) 6 Q. B. Div. 333, 50 L. J. Q. B. 305, show (see now *Quinn v. Leathem* [1901] A. C. 495, 510, 535, 70 L. J. P. C. 76, removing the doubts raised in *Allen v. Flood* [1898] A. C. 1, 67 L. J. Q. B. 119) that a stranger may be liable in tort for procuring the breach of a contract. But this

is not an obligation under the contract, any more than when A. sells his land to B. the duty of all men to respect the rights of B. instead of A., as owner of that land, is a duty under the contract of sale or the conveyance.

(*k*) *Re Metrop. Coal Consumers' Association, Karberg's case* [1892] 3 Ch. 1, 61 L. J. Ch. 741, C. A.

(*l*) *Lindley on Companies*, 146, 149.

tract and analogous to estoppel, namely, that when any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms. The doctrine as now established probably goes as far as this, but certainly no farther (*m*).

Stranger
held
bound by
award in
equity:
sed qu.

In one case of a suit in equity for specific performance of an award a third person interested in the subject-matter was made a party, and was held to be bound by the award, though he had not been a party to the reference and had in no way assented to it, but simply knew of it and remained passive (*n*). But it has been held by higher authority (*o*) that in a suit for the specific performance of a contract third persons claiming an interest in the subject-matter are not even proper parties: and even without this it seems obvious that A. and B. have no business to submit C.'s rights to the arbitration of D. It is apprehended accordingly that this exception may be treated as non-existent.

Novation.

Another branch of the same general doctrine is that the debtor cannot be allowed to substitute another person's liability for his own without the creditor's assent. A contract cannot be made except with the person with whom one intends to contract (*p*). When a creditor assents at the debtor's request to accept another person as his debtor in the place of the first, this is called a novation.

(*m*) Lindley on Companies, 152. As to ratification by companies, see p. 110, above.

(*n*) *Govett v. Richmond* (1834) 7 Sim. 1, 40 R. R. 56, doubted in *Martin v. L. C. & D. Ry. Co.* (1866) L. R. 1 Ch. 501, 507, 35 L. J. Ch. 795. In *Taylor v. Parry* (1840) 1 Man. & Gr. 604, the Court relied on positive acts of the parties as showing that they adopted the

reference and were substantially parties to it.

(*o*) *Tasker v. Small* (1837) 3 My. & Cr. 63, 45 R. R. 212, followed in *De Hoghton v. Money* (1866) L. R. 2 Ch. 164.

(*p*) *Robson v. Drummond* (1831) 2 B. & Ad. 303, 36 R. R. 569, see note (*d*), p. 200, above. Other cases bearing on the same point are considered for another purpose in Ch. IX. below.

Whether there has been a novation in any particular case is a question of fact, but assent to a novation is not to be inferred from conduct unless there has been a distinct and unambiguous request (*q*). Such questions are especially important in ascertaining who is liable for the partnership debts of a firm when there has been a change in the members of the firm, or on contracts made in a business which has been handed over by one firm (whether carried on by a single person, a partnership, or a company) to another. A series of cases which were, or were supposed to be, of this kind arose about 1875 out of successive amalgamations of life insurance companies (*r*).

The question may be resolved into two parts: Did the new firm assume the debts and liabilities of the old? and did the creditor, knowing this, consent to accept the liability of the new firm and discharge the original debtor (*s*)? It would be beyond our scope to enter at large on this subject (*t*).

There exist, however, exceptions to the general rule. In certain cases a new liability may without novation be created in substitution for or in addition to an existing liability, but where the possibility exists of such an exceptional transfer of liabilities it is bound up with the correlated possibility of an exceptional transfer of rights, and cannot be considered alone. For this reason the exceptions in question will come naturally to our notice under Rule 4, when we deal with the peculiar modes in which rights arising out of certain classes of contracts are transferred.

Real exceptions to come under Rule 4.

(*q*) *Conquest's case* (1875) 1 Ch. Div. 334, 341, 45 L. J. Ch. 336.

(*r*) It is doubtful whether some of these were really cases of novation: see *Hort's case* and *Grain's case* (1875) 1 Ch. D. 307, 322, 45 L. J. Ch. 321.

(*s*) See *Rolfe v. Flower* (1865)

L. R. 1 P. C. 27, 44, 35 L. J. P. C. 13.

(*t*) See Lindley on Partnership, 246 *sqq.*, and as to the general principle of novation, see *Wilson v. Lloyd* (1873) L. R. 16 Eq. 60, 74, 42 L. J. Ch. 559; for a later instance of true novation, *Miller's case* (1876) 3 Ch. Div. 391.

Apart from novation in the proper sense, the creditor may bind himself once for all by the original contract to accept a substituted liability at the debtor's option. Such an arrangement is in the nature of things unlikely to occur in the ordinary dealings of private persons among themselves. But it was decided in the winding-up of the European Assurance Society that where the deed of settlement of an insurance company contained a power to transfer the business and liabilities to another company, a transfer made under this power was binding on the policy-holders and they had no claim against the original company (*u*). In the case of a policy-holder there is indeed no subsisting debt (*u*), but he is a creditor in the wider sense above defined (p. 198).

Rule 3. A third person cannot become entitled by the contract itself to demand the performance of any duty under the contract.

Rule 3.
No rights
conferred
on third
persons.

Before we consider the possibility of creating arbitrary exceptions to this rule in any particular cases, there are some extensive classes of contracts and transactions analogous to contract which call for attention as offering real or apparent anomalies.

Excep-
tions.
Agency:
apparent
only.

A. Contracts made by agents. Here the exception is only apparent. The principal acquires rights under a contract which he did not make in person. But the agent is only his instrument to make the contract within the limits of the authority given to him, however extensive that authority may be: and from the beginning to the end of the transaction the real contracting party is the principal.

(*u*) *Hort's case* and *Grain's case* (1875) 1 Ch. D. 307, 45 L. J. Ch. 321; *Harman's case* (1875) 1 Ch. Div. 326, 45 L. J. Ch. 332; *Cocker's case* (1876) 3 Ch. Div. 1, 45 L. J. Ch. 882.

Consider the following series of steps from mere service to full discretionary powers : Degrees of agency.

1. A messenger is charged to convey a proposal, or the acceptance or refusal of one, to a specified person.

2. He is authorized to vary the terms of the proposal, or to endeavour to obtain a variation on the other party's proposal (*i. e.*, to make the best bargain he can with the particular person), within certain limits.

3. He is not confined to one person, but is authorized to conclude the contract with any one of several specified persons, or generally with any one from whom he can get the best terms.

4. He is not confined to one particular contract, but is authorized generally to make such contracts in a specified line of business or for specified purposes as he may judge best for the principal's interest (*x*).

The fact that in many cases an agent contracts for himself as well as for his principal, and the modifications which are introduced into the relations between the principal and the other party according as the agent is or is not known to be an agent at the time when the contract is made, do not prevent the acts of the agent within his authority from being for the purposes of the contract the acts of the principal, or the principal from being the real contracting party. Again when the agent is also a contracting party there are two alternative contracts with the agent and with the principal respectively. Agent contracting personally.

As for the subsequent ratification of unauthorized acts, there is no difference for our present purpose between a contract made with authority and one made without authority and subsequently ratified. The consent of the principal is referred back to the date of the original act by a beneficent and necessary fiction. Ratification.

B. There are certain relations created by contract, of which that of creditor, principal debtor, and surety may be mentioned. Other relations: principal

(*x*) Cp. Savigny, Obl. 2. 57-60.

and
surety;
terms
annexed
by law to
original
contract.

be taken as the type, in which the rights or duties of one party may be varied by a new contract between others. But when a surety is discharged by dealings between the creditor and the principal debtor, this is the result of a condition annexed by law to the surety's original contract. There is accordingly no real anomaly, though there is an apparent exception to the vague maxim that the legal effects of a contract are confined to the contracting parties: and there is not even any verbal inconsistency with any of the more definite rules we have stated. These cases are mentioned only because they have been considered as real exceptions by writers of recognized authority (*y*).

Anoma-
lous
effects of
bank-
ruptcy
and in-
solvency.

Insolvency and bankruptcy, again, have various consequences which affect the rights of parties to contracts, but which the general principles of contract are inadequate to explain. We allude to them in this place only to observe that it is best to regard them not as derived from or incidental to contract, but as results of an overriding necessity and beyond the region of contract altogether (*z*). Even those transactions in bankruptcy and insolvency which have some resemblance to contracts, such as statutory compositions with creditors, are really of a judicial or quasi-judicial character. It is obvious that if these transactions were merely contracts no dissenting creditor could be bound.

Trusts:
a real
exception,
if trust a
contract
between
author of
trust and
trustee.
So treated
by Scot-

C. The case of trusts presents a real and important exception, if a trust is regarded as in its origin a contract between the author of the trust and the trustee. It is quite possible, and may for some purposes be useful so to regard it. The Scottish institutional writers (who follow the Roman arrangement in the learning of Obligations as elsewhere) consider trust as a species of real contract

(*y*) See Pothier, Obl. § 89.

(*z*) A striking instance is furnished by the rule in *Waring's case*

(1815) 19 Ves. 345, 13 R. R. 217; see per Lord Cairns, *Banner v. Johnston* (1871) L. R. 5 H. L. at p. 174, 40 L. J. Ch. 730.

coming under the head of deposition (*a*). Conversely deposits, bailments, and the contract implied by law which is the foundation of the action for money received, are spoken of in English books as analogous to trusts (*b*). A chapter on the duties of trustees forms part of the best known American text-books on contracts, though no attempt is made, so far as we have ascertained, to explain the logical connection of this with the rest of the subject.

tish and American writers: analogy suggested in English books.

By the creation of a trust duties are imposed on and undertaken by the trustee which persons not parties to the transaction, or even not in existence at its date, may afterwards enforce. And the relation of a trustee to his *cestui que trust* is closely analogous to that of a debtor to his creditor, in so far as it has the nature of a personal obligation and is governed by the general rules derived from the personal character of obligations. Thus the transfer of equitable rights of any kind is subject, as regards the perfection of the transferee's title, to precisely the same conditions as the transfer of rights under a contract. And the true way to understand the nature and incidents of equitable ownership is to start with the notion not of a real ownership which is protected only in a court of equity, but of a contract with the legal owner which (in the case of trusts properly so called) cannot be enforced at all, or (in the case of constructive trusts, such as that which arises on a contract for the sale of land) cannot be enforced completely, except in a court of equity (*c*).

General analogy to contract.

However, although every trust may be said to include a contract, it includes so much more, and the purposes for which the machinery of trusts is employed are of so different a kind, that trusts are distinct in a marked way not merely from every other species of contract, but from

(*a*) *Sic*, though no such abstract term is known in Roman law. See Erskine, Inst. Bk. 3, Tit. 1. s. 32.

(*b*) Blackstone, Comm. iii. 432.

(*c*) See per Lord Westbury, *Knox*

v. *Gye* (1871-2) L. R. 5 H. L. at p. 675, 42 L. J. Ch. 234; *Shaw v. Foster* (1872) L. R. 5 H. L. at p. 338 (Lord Cairns) and at p. 356 (Lord Hatherley); 42 L. J. Ch. 49.

all other contracts as a genus. The complex relations involved in a trust cannot be reduced to the ordinary elements of contract.

Exception
of certain
provisions
for
children.

D. Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children. This exception has already been noted in stating the general rule (*d*). In the ordinary case of a marriage settlement the children of the contemplated marriage itself are said to be "within the consideration of marriage" (*e*) and may enforce any covenant for their benefit contained in the settlement. Where a settlement made on the marriage of a widow provides for her children by a former marriage, such children, though in the technical language of equity *volunteers*, or persons having no part in the consideration, have been held entitled to enforce the provisions for their benefit; but this extension has been doubted in the Court of Appeal (*f*).

The question how far limitations in a marriage settlement to persons other than children can be supported by the consideration of marriage, so as not to be defeasible under 27 Eliz. c. 4, against subsequent purchasers, is a distinct and wider one, not falling within the scope of the present work (*g*).

Statutory
excep-
tions :

E. There is also a class of statutory exceptions (though of decreasing importance) in cases where companies and

(*d*) P. 199, above; cp. per Cotton L.J. 15 Ch. D. at p. 242.

(*e*) It is even said that consideration moves, or is assumed to move, from them. But it must not be inferred from this that equity regards "la peine de naître" as a legal detriment.

(*f*) *Gale v. Gale* (1877) 6 Ch. D. 144, 152, 46 L. J. Ch. 809, criti-

cized per Lindley L.J. *A.-G. v. Jacobs Smith* [1895] 2 Q. B. 341, 349; and see *Re Cameron and Wells* (1887) 37 Ch. D. 32, 57 L. J. Ch. 69.

(*g*) The references in *Gale v. Gale* (last note) will guide the reader, if desired, to the authorities, including the full discussion in May on Voluntary and Fraudulent Conveyances.

public bodies, though not incorporated, are empowered to sue and be sued by their public officers or trustees. powers to sue by public officers, &c.

The trustees of Friendly Societies and Trade Unions are likewise empowered to sue, and may be sued, in their own names, in cases concerning the property of the society or union (*h*).

By 8 & 9 Vict. c. 106, s. 5, a person who is not a party to an indenture may nevertheless take the benefit of a covenant in it relating to real property. This enactment has not, so far as we know, been the subject of any reported decision (*i*). Covenants relating to real property.

Having disposed of these special exceptions, we may now proceed to examine the rule in its ordinary application, which may be expressed thus:—The agreement of contracting parties cannot confer on a third person any right to enforce the contract. General application of rule.

There are two different classes of cases in which it may seem desirable, and in which accordingly it has been attempted to effect this: (1) where the object of the contract is the benefit of a third person: (2) where the parties are numerous and the persons really interested are liable to be changed from time to time.

It was for a long time not clear whether a contract Contract for benefit

(*h*) Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), s. 21; Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 9. It is the same with building societies formed before the Act of 1874 and not incorporated under it. A statute enabling a local authority to recover expenses, and not specifying any remedy, has been held to make the local authority a quasi-corporation for the purpose of suing: *Mills v. Scott* (1873) L. R. 8 Q. B. 496, 42 L. J. Q. B. 234. And the grant of a right by the Crown to a class of persons may have the effect of incorporating them to enable them to exercise the right: *Willingale v.*

Maitland (1866) L. R. 3 Eq. 103, 36 L. J. Ch. 64, explained by Jessel M.R. in *Chilton v. Corporation of London* (1878) 7 Ch. D. at p. 741, 47 L. J. Ch. 433.

(*i*) For an example of the inconvenience provided against by it, see *Lord Southampton v. Brown* (1827) 6 B. & C. 718, 30 R. R. 511, where the person who was really interested in the payment of rent on a demise made by trustees and with whom jointly with the trustees the covenant for payment of rent was expressed to be made, was held incapable of joining in an action on the covenant.

of third
person.

Third per-
son cannot
sue at law.

between A. and B. that one of them should do something for the benefit of C. did or did not give C. a right of action on the contract (*k*). And there was positive authority that at all events a contract made for the benefit of a person nearly related to one or both of the contracting parties might be enforced by that person (*l*). However, the rule is now settled that a third person cannot sue on a contract made by others for his benefit even if the contracting parties have agreed that he may, and also that near relationship makes no difference as regards any common law right of action. The final decision was in *Tweddle v. Atkinson* (*m*). The following written agreement had been entered into:

“Memorandum of an agreement made this day between William Guy,” &c., “of the one part, and John Tweddle of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle his son-in-law, railway inspector, residing in Thornton, in the county of Fife in Scotland, and the said John Tweddle father to the aforesaid William Tweddle shall and will pay the sum of £100 to the said William Tweddle each and severally the said sums on or before the 21st day of August, 1855; and it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any Court of law or equity for the aforesaid sums hereby promised and specified.”

William Tweddle, the son of John Tweddle, brought an action against the executor of William Guy on this agreement, the declaration averring his relationship to the parties, and their intention to carry out a verbal agreement made before the plaintiff's marriage to provide a marriage portion. The action was held not to be maintainable. The Court did not in terms overrule the older

(*k*) See Viner, Abr. Assumpsit, Z. (1. 333-7); per Eyre C.J. *Co. of Feltmakers v. Davies* (1797) 1 Bos. & P. 98; note to *Pigott v. Thompson* (1802) 3 Bos. & P. 149.

(*l*) *Dutton v. Poole* (1677) (Ex. Ch.) 2 Lev. 213, Vent. 318, 322.

Approved by Lord Mansfield, Cowp. 443. There appears to have been much difference of opinion at the time.

(*m*) (1861) 1 B. & S. 393, 30 L. J. Q. B. 265.

cases to the contrary, considering that their authority was already sufficiently disposed of by the effect of modern decisions and practice (*n*).

The doctrines of equity are at first sight not so free from doubt. There is clear and distinct authority for these propositions: When two persons, for valuable consideration as between themselves, contract to do some act for the benefit of another person not a party to the contract—

Authorities in equity against right of third person.

(i) That person cannot enforce the contract against either of the contracting parties, at all events if not nearly and legitimately related to one of them (*o*). Probably the only exception is that mentioned above, pp. 199, 210, in favour of children provided for by marriage settlements.

(ii) But either contracting party may enforce it against the other although the person to be benefited had nothing to do with the consideration (*p*).

On the other hand the case of *Gregory v. Williams* (*q*) shows that a third person for whose benefit a contract is made may sometimes join as co-plaintiff with one of the actual contracting parties against the other, and insist on the arrangement being completely carried out. The facts of that case, so far as now material, may be stated as follows: Parker was indebted to Williams and also to Gregory; Williams, being informed by Parker that the debt to Gregory was about 900*l.*, and that there were no other debts, undertook to satisfy the debt to Gregory on having

Apparent exceptions. *Gregory v. Williams* (third person co-plaintiff with contractee).

(*n*) See also *Price v. Easton* (1833) 4 B. & Ad. 433. Much less can a stranger to a contract who has suffered damage by the non-performance of it sue the defaulting party as on the contract: *Playford v. United Kingdom Electric Telegraph Co.* (1869) L. R. 4 Q. B. 706, 38 L. J. Q. B. 249; *Dickson v. Reuter's Telegram Co.* (1877) 2 C. P. D. 62, in C. A. 3 C. P. Div. 1, 47 L. J. C. P. 1. It is a distinct

question whether these decisions rightly denied that there was any cause of action at all. See the present writer's book on the Law of Torts, 6th ed. 532-536.

(*o*) *Colyear v. Mulgrave* (1836) 2 Kee. 81, 44 R. R. 191.

(*p*) *Davenport v. Bishopp* (1843) 2 Y. & C. 451, 460, 1 Ph. 698, 704.

(*q*) (1817) 3 Mer. 582, 17 R. R. 136.

an assignment of certain property of Parker's. Gregory was not a party to this arrangement, nor was it communicated to him at the time. The property having been assigned to Williams accordingly, the Court held that Gregory, suing jointly with Parker, was entitled to call upon Williams to satisfy his debt to the extent of 900*l*. (but not farther, although the debt was in fact greater) out of the proceeds of the property. It was not at all suggested that he could have sued alone in equity any more than at law (*r*), and the true view of the case appears to be that the transactions between Williams and Parker amounted to a declaration of trust of the property assigned for the satisfaction of Gregory's claim to the specified extent (*s*).

Page v.
Cox: provision for
widow in
partnership
articles.

Another apparent exception is the case of *Page v. Cox* (*t*), where it was held that a provision in partnership articles that a partner's widow should be entitled to his share of the business might be enforced by the widow. But the decision was carefully put on the ground that the provision in the articles created a valid trust of the partnership property in the hands of the surviving partner. The result is that there is no real and allowed authority for holding that rights can in general be acquired by third parties under a contract, unless by the creation of a trust.

The general principle has been re-affirmed of late years. "A mere agreement between A. and B. that B. shall pay C. (an agreement to which C. is not a party either directly or indirectly) will not prevent A. and B. from coming to an agreement the next day releasing the old one" (*u*).

(*r*) For an attempt of a third person to sue at law under very similar circumstances, see *Price v. Easton* (1833) 4 B. & Ad. 433, showing clearly that A. cannot sue on a promise by B. to C. to pay C.'s debt to A.

(*s*) *Empress Engineering Co.* (1880)

16 Ch. Div. 125, 129, 130, by Jessel M.R. and James L.J.

(*t*) (1851) 10 Ha. 163, *cp. Murray v. Flavell* (1883) 25 Ch. Div. 89, 53 L. J. Ch. 185.

(*u*) Jessel M.R. *Empress Engineering Co.*, 16 Ch. Div. 125, 129.

"An agreement between A. and B. that B. shall pay C. gives C. no right of action against B." (x).

It is proper to mention that a different rule is prevalent in America, but there does not seem to be any general agreement as to its reason or its precise extent (y).

We now come to the class of cases in which contracting parties have attempted for their own convenience to vest the right of enforcing the contract in a third person. Except within the domain of the stricter rules applicable to parties to actions on deeds and negotiable instruments, there appears to be no objection to several contracting parties agreeing that one of them shall have power to sue for the benefit of all except the party sued. Thus where partners create by agreement penalties to be paid by any partner who breaks a particular stipulation, they may empower one partner alone to sue for the penalty (z). The application of the doctrines of agency may also lead to similar results (a). It seems doubtful whether a promise to several persons to make a payment to one of them will of itself enable that one to sue alone (b).

Third person empowered to sue for convenience of parties. Contracting parties can enable one of themselves to sue on behalf of himself and others:

(x) Lindley L.J. *Re Rotherham Alum and Chemical Co.* (1883) 25 Ch. Div. at p. 111. These statements overrule what is said in *Touche v. Metrop. Railway Warehousing Co.* (1871) L. R. 6 Ch. 671, 677, 40 L. J. Ch. 496 (the decision may be supported on the ground of trust, Lindley on Companies, 148). Compare further *Eley v. Positive, &c. Life Assurance Co.* (1876) 1 Ex. Div. 88, 45 L. J. Ex. 451 (a provision in articles of association that A. shall be solicitor to the company and transact all its legal business is as regards A. *res inter alios acta* and gives him no right against the company); *Melhado v. Porto Alegre Ry. Co.* (1874) L. R. 9 C. P. 503, 43 L. J. C. P. 253.

(y) See Harriman on Contracts (Boston, U. S., 2nd ed. 1901) pp. 212—226.

(z) *Radenhurst v. Bates* (1826) 3 Bing. 463, 470, 28 R. R. 659. Of course they must take care to make

the penalty payable not to the whole firm, but to the members of the firm *minus* the offending partner. Whether under the present Rules of Court the other partners could use the name of the firm to sue for the penalty, *quære*.

(a) *Spurr v. Cass* (1870) L. R. 5 Q. B. 656, 39 L. J. Q. B. 249.

(b) *Chanter v. Leese* (1839) 4 M. & W. 295, in Ex. Ch. 5 M. & W. 698, 51 R. R. 584, where both Courts inclined to think not, but gave no decision. In *Jones v. Robinson* (1847) 1 Ex. 454, 17 L. J. Ex. 36, an action was brought by one of two late partners against the purchaser of the business on a promise to pay the plaintiff what was due to him from the firm for advances. This was declared on as a separate promise in addition to a general promise to the two partners to pay the partnership debts, and the only question was whether there was any separate consideration for the promise sued on.

But cannot enable a stranger. Attempts by unincorporated companies to appoint a nominal plaintiff.

But it is quite clear that the most express agreement of contracting parties cannot confer any right of action on the contract on a person who is not a party. Various devices of this kind have been tried in order to evade the difficulties that stand in the way of unincorporated associations enforcing their rights, but have always failed when attention was called to them. This has happened in the case of actions brought by the chairman for the time being of the directors of a company (*c*), by the directors for the time being of a company (*d*), by the purser for the time being of a cost-book company (*e*), and by the managers of a mutual marine insurance society (*f*). It will not be necessary to dwell on any instance other than the last. In *Gray v. Pearson* the reasons against allowing the right of action are well given in the judgment of Willes J.:—

Judgment of Willes J. in *Gray v. Pearson*.

“I am of opinion that this action cannot be maintained, and for the simple reason,—a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance in the case of agents, auctioneers, or factors, these exceptions are in truth more apparent than real. The persons who are suing here are mere agents, managers of an assurance association of which they are not members; and they are suing for premiums alleged to have become payable by the defendant in respect of policies effected by the plaintiffs for him, and for his share and contributions to losses and damages paid by them to other members of the association whose vessels have been lost or damaged. The bare statement of the facts is enough to show that the action cannot be maintained.

“It is in effect an attempt to substitute a person as a nominal plaintiff in lieu of the persons whose right have been violated.”

Notes and bills payable to

At common law the payee of a negotiable instrument must, on the same principle, be a person who can be

(*c*) *Hall v. Bainbridge* (1840) 1 Man. & Gr. 42.

(*d*) *Phelps v. Lyle* (1839) 10 A. & E. 113, 50 R. R. 353.

(*e*) *Hybart v. Parker* (1858) 4 C. B. N. S. 209, 27 L. J. C. P. 120; where Willes J. suggested that it was trenching on the prerogatives of the Crown to make a new species

of corporation sole for the purpose of bringing actions.

(*f*) *Gray v. Pearson* (1870) L. R. 5 C. P. 568; in the earlier case of *Gray v. Gibson* (1866) L. R. 2 C. P. 120, 36 L. J. C. P. 99, a similar action succeeded, the question of the manager's right to sue not being raised.

ascertained at the time of accepting the bill or making the note. But by the Bills of Exchange Act, 1882, s. 7, a bill (and it seems by ss. 73 and 89 also a cheque or a promissory note) may be made payable to the holder of an office for the time being (*g*). holder of office.

Assignment of Contracts.

Rule 4. We now come to the fourth rule, which we have expressed thus:— Rule 4.
Transfer of rights under contract.

Persons other than the creditor may become entitled by representation or assignment to stand in the creditor's place and to exercise his rights under the contract.

We need say nothing here about the right of personal representatives to enforce the contracts of the person they represent, except that it has been recognized from the earliest period of the history of our present system of law (*h*). With regard to assignment, the benefit of a contract cannot be assigned (except by the Crown) at common law so as to enable the assignee to sue in his own name (*i*). The origin of the rule was attributed by Coke to the "wisdom and policy of the founders of our law" in discouraging maintenance and litigation (*k*): but it is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the creditor and the debtor (*l*). Anyhow it has been long established that the proper course at common Right to sue on contract not assignable at common law: probable origin of the rule.

(*g*) On the former law see *Holmes v. Jaques* (1866) L. R. 1 Q. B. 376, 35 L. J. Q. B. 130.

(*h*) Subject to some technical exceptions which have now disappeared: see notes to *Wheatley v. Lane* (1667) 1 Wms. Saund. 240 *sqq.* and for early instances of actions of debt brought by executors, Y. B. 20 & 21 Ed. I. pp. 304, 374.

(*i*) *Termes de la Ley*, tit. *Chose in Action*.

(*k*) *Lampet's case* (1613) 10 Co. Rep. 48 *a*. For exposition of the

rule in detail, see Dicey on Parties, 115.

(*l*) Spence, Eq. Jurisd. of Chy. 2. 850. An examination of the earlier authorities has been found to confirm this view. The rule is assumed as unquestionable, and there is no trace of Coke's reason for it. The objection of maintenance was set up, not against the assignee suing in his own name, which was never attempted so far as we can find, but against his suing in the name of the assignor: see Note F in Appendix.

law is for the assignee to sue in the name of the assignor. It appears from the Year Books that attempts were sometimes made to object to actions of this kind on the ground of maintenance, but without success. That same rule is stated by Gaius as prevailing in the Roman law (*m*).

In equity
assignee
may sue, if
necessary.

In equity the right of the assignee was pretty soon recognized and protected, that is, if the assignor refused to empower the assignee to sue in his name at law. Where the assignee had an easy remedy by suing in the name of the assignor, the Court of Chancery would not interfere (*n*).

Legal
right of
assignee
under Ju-
dicature
Act, 1873.

The Supreme Court of Judicature Act, 1873 (s. 25, sub-s. 6), creates a legal right to sue in the assignee's own name, but confined to cases where the assignment is absolute (*o*), and by writing under the hand of the assignor, and express notice in writing has been given to the debtor.

In equity
more
extensive :
how far
governed

There may still be more extensive equitable rights of this kind. By the Statute of Frauds (29 Car. 2, c. 3), s. 9, "all grants and assignments of any trust or confidence"

(*m*) Gai. 2. 38, 39. Quod mihi ab aliquo debetur, id si velim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur, id efficere possum: sed opus est, ut iubente me tu ab eo stipuleris: quae res efficit ut a me liberetur et incipiat tibi teneri quae dicitur novatio obligationis. Sine hac vero novatione non poteris tuo nomine agere, sed debes ex persona mea quasi cognitor aut procurator meus experiri. In later times the transferee of a debt was enabled to sue by *utilis actio* in his own name. This seems to have been first introduced only for the benefit of the purchaser of an inheritance: D. 2. 14 de pactis, 16 *pr.*, C. 4. 39. de hered. vel act. vend. 1, 2, 4—6; and afterwards extended to all cases: C. eod. tit. 7, 9. See too C. 4. 10. de obl. et act. 1, 2, C. 4. 15. quando fiscus, 5, Arndts, Lehrbuch der Pandekten, § 254.

(*n*) *Hammond v. Messenger* (1838) 9 Sim. 327, Spence, 2. 854, Harv. Law Rev. i. 6—7.

(*o*) *Tancred v. Delagoa Bay and*

E. Africa Ry. Co. (1889) 23 Q. B. D. 239, 58 L. J. Q. B. 459. An absolute assignment may be subject to a trust in respect of the moneys recovered: *Comfort v. Betts* [1891] 1 Q. B. 737, 60 L. J. Q. B. 656, C. A. Whether the sub-section applies to an assignment of part of an entire debt, *quære*: *Durham Bros. v. Robertson* [1898] 1 Q. B. 765, 774, 67 L. J. Q. B. 484, C. A. At all events an undefined part will not do: *Jones v. Humphreys* [1902] 1 K. B. 10, 71 L. J. K. B. 23. See further as to what amounts to an absolute assignment, *Mercantile Bank of London v. Evans* [1899] 2 Q. B. 613, 68 L. J. Q. B. 921, C. A.; *Marchant v. Morton, Down & Co.* [1901] 2 K. B. 829, 70 L. J. K. B. 820. The term "legal chose in action" in a corresponding Colonial Act has been held to include a cause of action for negligence: *King v. Victoria Insurance Co.* [1896] A. C. 250, 65 L. J. P. C. 38; and see per Farwell, J., *Manchester Brewery Co. v. Coombs* [1901] 2 Ch. 608, 619.

must be in writing signed by the assignor, and by sect. 7, equitable interests in land must be created by writing. Sect. 9 does not require writing for the creation in the first instance by the legal owner or creditor of an equitable interest in personal property or a chose in action: and it may be argued perhaps that its operation is altogether confined to interests in land by the context in which it occurs. The writer is not aware of any decision upon it (*p*).

by Statute of Frauds, *qu.*

It seems that to constitute an equitable assignment there must be at least an order to pay out of a specified fund (*q*).

As for the notice to the debtor, the rule of equity is that it must be express but need not be in writing (*r*).

There remain, therefore, a great number of cases where the right is purely equitable, although the enlarged jurisdiction of every branch of the Supreme Court makes the distinction less material than formerly.

Several partial exceptions to the common rule have been made at different times by modern statutes, on which, however, it seems unnecessary to dwell (*s*).

In other special cases by statute.

In ordinary cases rights under a contract derived by

Limitation of

(*p*) See 1 Sanders on Uses, 5th ed. 343.

(*q*) *Percival v. Dunn* (1885) 29 Ch. Div. 128, 54 L. J. Ch. 572. An adventurous attempt to extend the conception of equitable assignment may be seen in *Western Wagon and Property Co. v. West* [1892] 1 Ch. 271, 61 L. J. Ch. 244.

(*r*) *Re Tichener* (1865) 35 Beav. 317.

(*s*) The more important instances are these:—

East India Bonds, 51 Geo. 3, c. 64, s. 4, which makes them negotiable.

Mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 78, amended by 33 & 34 Vict. c. 20.

Policies of life assurance: 30 & 31

Vict. c. 144.

Policies of marine insurance: 31 & 32 Vict. c. 86.

Things in action of companies (Companies Act, 1862, s. 157) and bankrupts (Bankruptcy Act, 1883, ss. 56, 57, and see definition of "property," s. 168) assigned in pursuance of those Acts respectively. As to the effect of registration under the present Acts of previously existing companies, &c., in transferring the right to sue on the contracts made by the company or its officers in its former state, see the Companies Act, 1862, s. 193.

Local authorities (including any authority having power to levy a rate) may issue transferable debentures and debenture stock under the Local Loans Acts, 1875, 38 & 39 Vict. c. 83.

assignee's assignment from the original creditor are subject, as rights. already stated, to the following limitations :—

1st. Title by assignment is not complete as against the debtor without notice to the debtor, and a debtor who performs his contract to the original creditor without notice of any assignment by the creditor is thereby discharged.

2nd. The debtor is entitled as against the representatives, and, unless a contrary intention appears by the original contract, as against the assignees of the creditor, to the benefit of any defence which he might have had against the creditor himself.

Rules of equitable assignment in general. Notice to debtor.

1. As to notice to the debtor. Notice is not necessary to complete the assignee's equitable right as against the original creditor himself, or as against his representatives, including assignees in bankruptcy (*t*) : but the claims of competing assignees or incumbrancers rank as between themselves not according to the order in date of the assignments, but according to the dates at which they have respectively given notice to the debtor. This was decided by the cases of *Dearle v. Hall* and *Loveridge v. Cooper* (*u*), the principle of which was soon afterwards affirmed by the House of Lords (*x*). The same rule prevails in the modern civil law (*y*) and has been adopted from it in the Scottish law (*z*) ; and the true reason of it, though not made very prominent in the decisions which establish the rule in England, is the protection of the debtor. He has a right to look to the person with whom he made his contract to accept performance of it, and to give him a

(*t*) *Burn v. Carvalho* (1839) 4 M. & Cr. 690, 48 R. R. 213.

(*u*) (1823-7) 3 Russ. 1, 38, 48, 27 R. R. 1.

(*x*) *Foster v. Cockerell* (1835) 3 Cl. & F. 456, 39 R. R. 24. It has only lately been decided that a second assignee who takes his assignment not from the beneficiary himself, but from his legal personal representative, may equally gain

priority by notice : *Freshfield's Trusts* (1879) 11 Ch. Div. 198. The rule is criticized, though allowed to be settled law, in *Ward v. Duncombe* [1893] A. C. 369, per Lord Macnaghten at pp. 391-3, 62 L. J. Ch. 881.

(*y*) See Pothier, *Contrat de Vente*, §§ 560, 554 *sqq.*

(*z*) *Erskine Inst. Bk. 3, Tit. 5.*

discharge, unless and until he is distinctly informed that he is to look to some other person. According to the original strict conception of contract ("à ne considérer que la subtilité du droit" as Pothier (*a*) expressed it), his creditor or his creditor's assignee cannot even require him to do this, any more than in the converse but substantially different case a debtor can require his creditor to accept another person's liability, and his assent must be expressed by a novation (*b*). Such was in fact the old Roman law, as is shown by the passage already cited from Gaius. By the modern practice the novation is dispensed with, and the debtor becomes bound to the assignee of whom he has notice. But he cannot be bound by any other assignment, though prior in time, of which he knows nothing. He is free if he has fulfilled his obligation to the original creditor without notice of any assignment; he is equally free if he fulfils it to the assignee of whose right he is first informed, not knowing either of any prior assignment by the original creditor or of any subsequent assignment by the new creditor (*c*). It is enough for the completion of the assignee's title "if notice be given to the person by whom payment of the assigned debt is to be made, whether that person is himself liable or is merely charged with the duty of making the payment" (*d*), *e. g.*, as an agent entrusted with a particular fund. Notice not given by the assignee may be sufficient, if shown to be such as a reasonable man would act upon (*e*). All this doctrine of notice has no application to interests in land (*f*): but, subject to that

This does not apply to interests

(*a*) Contrat de Vente, § 551.

(*b*) See p. 204, above.

(*c*) See per Willes J., L. R. 5 C. P. at p. 594. Per Knight Bruce L.J. *Stocks v. Dobson* (1853) 4 D. M. G. 11, 17, 22 L. J. Ch. 884. Notice after a negotiable instrument has been given by the debtor is too late even if the instrument is still held by the original creditor: *Bence v. Shearman* [1898] 2 Ch. 582, 67 L. J. Ch. 513, C. A.

(*d*) Per Lord Selborne C. *Addison v. Cox* (1872) L. R. 8 Ch. 76, 79, 42 L. J. Ch. 291.

(*e*) *Lloyd v. Banks* (1868) L. R. 3 Ch. 488.

(*f*) Although the exception is fully established its reasonableness is doubtful. Its effect is that equitable interests in land stand on a different footing from personal rights: see this relied on as the ground of the exception, *Jones v.*

in land ;
but does to
all other
equitable
interests.

exception, it applies to rights created by trust as well as to those created by contract; the beneficial interest being treated for this purpose exactly as if it were a debt due from the trustee. In the case of trusts a difficulty may arise from a change of trustees; for it may happen that a fund is transferred to a new set of trustees without any notice of an assignment which has been duly notified to their predecessors, and that notice is given to the new trustees of some other assignment. It is still unsettled which of the assignees is entitled to priority in such a case: but it has been decided that the new trustees cannot be made personally liable for having acted on the second assignment (*g*).

The rules as to notice apply to dealings with future or contingent as well as with present and liquidated claims. "An assurance office might lend money upon a policy of insurance to a person who had insured his life, notwithstanding any previous assignment by him of the policy of which no notice had been given to them" (*h*).

Assignee
takes sub-
ject to
equities:
double
meaning
of the rule.

2. As to the debtor's rights against assignees. The rule laid down in the second explanation is often expressed in the maxim "The assignee of an equity is bound by all the equities affecting it." This, however, includes another rule founded on a distinct principle, which is that no transaction purporting to give a beneficial interest apart from legal ownership (*i*) can confer on the person who takes or

Jones (1837-38) 8 Sim. 633, 42 R. R. 249. But on the other hand their liability to be defeated by a purchase of the legal estate for value without notice shows that they fall short of real ownership.

(*g*) *Phipps v. Lovegrove* (1873) L. R. 16 Eq. 80, 42 L. J. Ch. 892; see L. R. 16 Eq. p. 90 as to the precautions to be taken by an assignee of an equitable interest who wishes to be perfectly safe. The death of one of two or more trustees, being the only one who has

notice of an incumbrance, does not deprive that incumbrance of the priority it has gained: *Ward v. Duncombe* [1893] A. C. 369, 62 L. J. Ch. 881.

(*h*) L. R. 16 Eq. at p. 88.

(*i*) Certain dicta in *Sharples v. Adams* (1863) 32 Beav. 213, 216, and *Maxfield v. Burton* (1873) L. R. 17 Eq. 15, 19, 43 L. J. Ch. 46, go even farther; but it seems at least doubtful whether they can be supported.

is intended to take such an interest any better right than belonged to the person professing to give it him. If A. contracts with B. to give B. something which he has already contracted to give to C., then C.'s claim to have the thing must prevail over B.'s, whether B. knew of the prior contract with C. or not (*k*). And if B. makes over his right to D., D. will have no better right than B. had (*l*). And this applies not only to absolute but to partial interests (such as equitable charges on property) to the extent to which they may affect the property dealt with. Again, by a slightly different application of the same principle, a creditor of A. who becomes entitled by operation of law to appropriate for the satisfaction of his debt any beneficial interest of A.'s (whether an equitable interest in property or a right of action) can claim nothing more than such interest as A. actually had; and he can gain no priority by notice to A.'s trustee or debtor even in cases where he might have gained it if A. had made an express and unqualified assignment to him (*m*). But we are not concerned here with the development of these doctrines, and we return to the other sense of the general maxim. In that sense it is used in such judicial expressions as the following:

"If there is one rule more perfectly established in a court of equity than another, it is this, that whoever takes an assignment of a chose in action takes it subject to all the equities of the person who made the assignment" (*n*).

"It is a rule and principle of this Court, and of every Court, I believe, that where there is a chose in action, whether it is a debt, or an obligation, or a trust fund, and it is assigned, the person who holds the debt or

(*k*) This is of course consistent with B. having his remedy in damages. Cp. p. 31, above.

(*l*) See *Pinkett v. Wright* (1842) 2 Ha. 120, *affd. nom. Murray v. Pinkett* (1846) 12 Cl. & F. 764; *Ford v. White* (1852) 16 Beav. 120; *Clack v. Holland* (1854) 19 Beav. 262.

(*m*) *Pickering v. Ilfracombe Ry. Co.* (1868) L. R. 3 C. P. 235, 37 L. J. C. P. 118, overruling virtually *Watts v. Porter* (1854) 3 E. & B. 743, 23 L. J. Q. B. 345, see *Crow v. Robinson* (1868) L. R. 3 C. P. 264; judgment of Erle J. (*diss.*) in *Watts v. Porter*.

(*n*) Lord St. Leonards, *Mangles v. Dixon* (1852) 3 H. L. C. 702, 731.

obligation, or has undertaken to hold the trust fund, has as against the assignee exactly the same equities that he would have as against the assignor" (o).

This is in fact the same principle which is applied by common law as well as equity jurisdictions for the protection of persons who contract with agents not known to them at the time to be agents (p). What is meant by this special use of the term "equities" will be best shown by illustration. A debt is due from B. to A., but there is also a debt due from A. to B. which B. might set off in an action by A. In this state of things A. assigns the first debt to C. without telling him of the set-off. B. is entitled to the set-off as against C. (q). Again, B. has contracted to pay a sum of money to A., but the contract is voidable on the ground of fraud or misrepresentation. A. assigns the contract to C., who does not know the circumstances that render it voidable. B. may avoid the contract as against C. (r). Again, in a somewhat less simple case, there is a liquidated debt from B. to A. and a current account between them on which the balance is against A. A. assigns the debt to C., who knows nothing of the account. B. may set off as against C. the balance which is due on the current account when he receives notice of the assignment, but not any balance which becomes due afterwards (s).

The rule may be excluded by agreement of original contracting

But it is open to the contracting parties to exclude the operation of this rule if they think fit by making it a term of the original contract that the debtor shall not set up against an assignee of the contract any counter claim which he may have against the original creditor. This is

(o) *James L.J.* (sitting as V.-C.) *Phipps v. Lovegrove* (1873) L. R. 16 Eq. 80, 88, 42 L. J. Ch. 892.

(p) See pp. 103, 104, above.

(q) *Cavendish v. Geaves* (1857) 24 Beav. 163, 173, 27 L. J. Ch. 314, where the doctrine is fully expounded. As to set-off accruing after notice of assignment, *Stephens*

v. Venables (1862) 30 Beav. 625; *Watson v. Mid Wales Ry. Co.* (1867) L. R. 2 C. P. 593, 30 L. J. C. P. 285.

(r) *Graham v. Johnson* (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374.

(s) *Cavendish v. Geaves* (1857) 24 Beav. 163, 27 L. J. Ch. 314.

established by the decision of the Court of Appeal in Chancery in *Ex parte Asiatic Banking Corporation*, the facts of which have already been stated for another aspect of the case (*t*). parties.
Asiatic
Banking
Corpora-
tion's case.

Two alternative grounds were given for the decision in favour of the claim of the Asiatic Banking Corporation under the letter of credit. One, which we have already noticed, was that the letter was a general proposal, and that there was a complete contract with any one who accepted it by advancing money on the faith of it. The other was that, assuming the original contract to be only with Dickson, Tatham, & Co. to whom the letter was given, yet the takers of bills negotiated under the letter were assignees of the contract, and it appeared to have been the intention of the original parties that the equities which might be available for the bank against Dickson, Tatham, & Co. should not be available against assignees. Lord Cairns, then Lord Justice, thus stated the law:—

“Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities.”

Where assignees of a chose in action are enabled by statute to sue at law, similar consequences may be produced by way of estoppel (*u*); which really comes to the same thing, the doctrine of estoppel being a mere technical and definite expression of the same principle.

The principle thus laid down has been followed out in several later decisions on the effect of transferable debentures issued by companies. The question whether the holder of such a debenture takes it free from equities is to be determined by the original intention of the parties. Subse-
quent
decisions:
form of
instru-
ment,
how far
material.

(*t*) (1867) L. R. 2 Ch. 391, 36 L. J. Ch. 222, p. 23, *supra*.

(*u*) *Webb v. Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642, 39 L. J. Q. B. 221.

The form of the instrument is of course material, but the general tenor is to be looked to rather than the words denoting to whom payment will be made; these cannot be relied on as a sole or conclusive test. Making a debenture payable to the holder or bearer does not necessarily mean more than that the issuing company will not require the holder who presents the instrument for payment to prove his title, especially if the object of the debenture is on the face of it to secure a specific debt (*x*). But an antecedent agreement to give debentures in such a form is evidence that they were meant to be assignable free from equities (*y*); and debentures payable to bearer without naming any one as payee in the first instance are *prima facie* so assignable (*z*) and may be negotiable (*a*); so again if the document resembles a negotiable instrument rather than a common money bond or debenture in its general form (*b*).

Even when there is nothing on the face of the instrument to show the special intention of the parties, the issuer cannot set up equities against the assignee if the instrument was issued for the purpose of raising money on it (*c*). The general circumstances attending the original contract—*e.g.* the issue of a number of debentures to a creditor instead of giving a single bond or covenant for the whole amount due—may likewise be important. Moreover, apart from any contract with the original creditor, the issuing company may be estopped from setting up

(*x*) *Financial Corporation's claim* (1868) L. R. 3 Ch. 355, 360, 37 L. J. Ch. 362.

(*y*) *Ex parte New Zealand Banking Corporation* (1867) L. R. 3 Ch. 154, 37 L. J. Ch. 418.

(*z*) *Ex parte Colborne & Strawbridge* (1870-1) L. R. 11 Eq. 478, 40 L. J. Ch. 93, 343.

(*a*) *Notwithstanding Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. 374, 385, 42 L. J. Q. B. 183, see

Bechuanaland Exploration Co. v. London Trading Bank [1898] 2 Q. B. 658, 67 L. J. Q. B. 986.

(*b*) *Ex parte City Bank* (1868) L. R. 3 Ch. 758.

(*c*) *Dickson v. Swansea Vale Ry. Co.* (1868) L. R. 4 Q. B. 44, 38 L. J. Q. B. 17; *Graham v. Johnson* (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374, seems not consistent with this.

equities against assignees by subsequent recognition of their title (*d*).

The rule extends to an order for the delivery of goods as well as to debentures or other documents of title to a debt payable in money (*e*).

On principle this doctrine seems inapplicable in a case where the original contract is not merely subject to a cross claim but voidable. For the agreement that the contract shall be assignable free from equities is itself part of the contract, and should thus have no greater validity than the rest. A collateral contract for a distinct consideration might be another matter: but the notion of making it a term of the contract itself that one shall not exercise any right of rescinding it that may afterwards be discovered seems to involve the same kind of fallacy as the sovereign power in a state assuming to make its own acts irrevocable. Nor does it make any difference, so long as we adhere to the general rules of contract, that the stipulation is in favour, not of the original creditor, but only of his assignees (*f*). However, the point has not been distinctly raised in any of the decided cases. In *Graham v. Johnson* (*g*), where the contract was originally voidable (if not altogether void: the plaintiff had executed a bond under the impression that he was accepting or indorsing a bill of exchange) (*h*), an assignee of the bond as well as the obligee was restrained from enforcing the bond: but the

Qu. when the original contract is voidable.

(*d*) *Higgs v. Northern Assam Tea Co.* (1869) L. R. 4 Ex. 387, 38 L. J. Ex. 233; *Ex parte Universal Life Assurance Co.* (1870) L. R. 10 Eq. 458, 39 L. J. Ch. 829 (on same facts); *Ex parte Chorley* (1870) L. R. 11 Eq. 157, 40 L. J. Ch. 153; cp. *Re Bahia & San Francisco Ry. Co.* (1868) L. R. 3 Q. B. 584, 37 L. J. Q. B. 176. *Qu.* can *Athenæum Life Assurance Soc. v. Pooley* (1858) 3 De G. & J. 294, 28 L. J. Ch. 119, be reconciled with these cases? It seems not: *Brunton's claim* (1874) L. R. 19 Eq. 302, 312, 44 L. J.

Ch. 450.

(*e*) *Merchant Banking Co. of London v. Phœnix Bessemer Steel Co.* (1877) 5 Ch. D. 205, 46 L. J. Ch. 418.

(*f*) In principle it is the same as the case put in the Digest (50. 17, de reg. iuris, 23) "non valere si convenerit, ne dolus praestetur."

(*g*) (1869) L. R. 8 Eq. 36, 38 L. J. Ch. 374.

(*h*) The evidence was conflicting, but the Court took this view of the facts: see L. R. 8 Eq. at p. 43.

decision was rested on the somewhat unsatisfactory ground that, although the instrument was given for the purpose of money being raised upon it, there was no intention expressed on the face of it that it should be assignable free from equities.

However, if the contract were not enforceable as between the original parties only by reason of their being *in pari delicto*, as not having complied with statutory requirements or the like, an assignee for value without notice of the original defect will, at all events, have a good title by estoppel (*i*).

Negotiable instruments. Difficulties of assignee of ordinary contract.

We may now observe the difficulties which make the mere assignment of a contract inadequate for the requirements of commerce, and to meet which negotiable instruments have been introduced.

The assignee of a contract is under two inconveniences (*k*). The first is that he may be met with any defence which would have been good against his assignor. This, we have seen, may to a considerable extent if not altogether be obviated by the agreement of the original contracting parties.

The second is that he must prove his own title and that of the intermediate assignees, if any; and for this purpose he must inquire into the title of his immediate assignor. This can be in part, but only in part, provided against by agreement of the parties. It is quite competent for them to stipulate that as between themselves payment to the holder of a particular document shall be a good discharge; but such a stipulation will neither affect the rights of intermediate assignees nor enable the holder to compel payment without proving his title. Parties cannot set up a market overt for contractual rights.

Remedy by special

The complete solution of the problem, for which the

(*i*) See *Webb v. Herne Bay Commissioners* (1870) L. R. 5 Q. B. 642,

39 L. J. Q. B. 221.

(*k*) Cp. Savigny, Obl. § 62.

ordinary law of contract is inadequate, is attained by the law merchant (l) in the following manner:—

rules of
law mer-
chant.

(i.) The absolute benefit of the contract is attached to the ownership of the document which according to ordinary rules would be only evidence of the contract.

(ii.) The proof of ownership is then facilitated by prescribing a mode of transfer which makes the instrument itself an authentic record of the successive transfers: this is the case with instruments transferable by indorsement.

(iii.) Finally this proof is dispensed with by presuming the *bona fide* possessor of the instrument to be the true owner: this is the case with instruments transferable by delivery, which are negotiable in the fullest sense of the word.

The result is that the contract is completely embodied (m) for all practical purposes in the instrument which is the symbol of the contract; and both the right under the contract and the property in the instrument are treated in a manner quite at variance with the general principles of contract and ownership. We give references to a few passages where specimens will be found of the positive terms in which the privileges of *bona fide* holders of negotiable instruments have been repeatedly asserted by the highest judicial authority (n).

Negoti-
able in-
struments.
Peculiar
and
extensive
rights of
bona fide
holder.

The narrower doctrine which for a time prevailed, requiring a certain measure of caution on the part of the holder, is now completely exploded. Nothing short of actual knowledge of the facts affecting his transferor's title

(l) Extended to promissory notes by statute: 3 & 4 Ann. c. 8 (in Rev. Stat.) ss. 1-3, now superseded and repealed by the Bills of Exchange Act, 1882.

(m) "Verkörperung der Obligation," Savigny.

(n) See per Byles J. *Swan v. N. B. Australasian Co.* (1863) in Ex. Ch. 2 H. & C. 184, 31 L. J. Ex. 425: per Lord Campbell, *Brandao v. Barnett* (1846) 12 Cl. & F. 787;

opinion of Supreme Court, U. S. delivered by Story J. *Swift v. Tyson* (1842) 16 Peters 1, 15. The following references as to the nature of the contracts undertaken by the parties to a bill of exchange may be found useful. Acceptor and drawer: *Jones v. Broadhurst* (1850) 9 C. B. 173, 181; *Lebel v. Tucker* (1867) L. R. 3 Q. B. 77, 84, 37 L. J. Q. B. 46. Indorser: L. R. 3 Q. B. 83; *Denton v. Peters* (1870) L. R. 5 Q. B. 475, 477.

or wilful and therefore dishonest avoidance of inquiry (*o*) will defeat the holder's right (*p*).

Moreover, there is no discrepance between common law and equity in this matter. Equity has interfered in certain cases of forgery and fraud to restrain negotiation; but at law no title to sue on the instrument can be made through a forgery (*q*); and "the cases of fraud where a bill has been ordered to be given up are confined to those where the possession, but for the fraud, would be that of the plaintiff in equity" (*r*). The rights of *bona fide* holders for value are as fully protected in equity as at common law, and against such a holder equity will not interfere (*s*).

Qualities
of nego-
tiable in-
struments.
Limiting
rules in
Crouch v.
Crédit
Foncier.

The most frequent examples of negotiable instruments are bills of exchange (of which cheques are a species) (*t*) and promissory notes. Their exceptional qualities are concisely stated in *Crouch v. Crédit Foncier* (*u*):—

"Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who, by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value he has a good title notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."

It is doubtful at common law whether the seal of a corporation can be treated as equivalent to signature for the purpose of making a bill or note under it negotiable; in England the doubt is removed by the Bills of Exchange Act (*x*).

(*o*) Lord Blackburn in *Jones v. Gordon* (1877) 2 App. Ca. at p. 629.

(*p*) *Goodman v. Harvey* (1836) 4 A. & E. 870, 876, 43 R. R. 507, 509; *Raphael v. Bank of England* (1855) 17 C. B. 161, 175, 25 L. J. C. P. 33: Bills of Exchange Act, s. 90, and Mr. Chalmers' note thereon.

(*q*) The *bona fide* holder of an instrument with a forged indorsement may be exposed to considerable hardship. See *Bobbett v. Penkett* (1876) 1 Ex. D. 368, 35 L. J. Ex. 555.

(*r*) *Jones v. Lane* (1838-9) 3 Y. & C. Ex. in Eq. 281, 293.

(*s*) *Thiedemann v. Goldschmidt* (1859) 1 D. F. J. 4.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 73. And they are equally negotiable: *M'Lean v. Clydesdale Banking Co.* (1883) 9 App. Ca. 95.

(*u*) L. R. 8 Q. B. 374, 42 L. J. Q. B. 183.

(*x*) But the addition of the seal will not prevent an instrument from being a good bill or note if it is also signed by an agent or agents for

A negotiable instrument must be a contract to pay money or to deliver another negotiable security representing money (*y*): therefore a promise in writing to deliver 1000 tons of iron to the bearer is not negotiable and gives no right of action to the possessor (*z*).

Mere private agreement or *particular* custom cannot be admitted as part of the law merchant so as to introduce new kinds of negotiable instruments. But the fact that a *universal* mercantile usage is modern is no reason against its being judicially recognized as part of the law merchant. The notion that general usage is insufficient merely because it is not ancient is founded on the erroneous assumption that the law merchant is to be treated as fixed and invariable (*a*). The negotiability of debentures issued by limited companies has now been recognized on the ground of general though modern mercantile custom (*b*).

The bonds of foreign governments issued abroad and treated in the English market as negotiable instruments are recognized as such by law (*c*). So is the provisional scrip issued in England by the agent of a foreign government as preparatory to giving definite bonds (*d*). Such bonds or scrip, and other foreign instruments negotiable by the law of the country where they are made, may be

the company so that it would be good without the seal: see *Halford v. Cameron's Coalbrook, &c. Co.* (1851) 16 Q. B. 442, 20 L. J. Q. B. 160; *Aggs v. Nicholson* (1856) 1 H. & N. 165, 25 L. J. Ex. 348; *Balfour v. Ernest* (1859) 5 C. B. N. S. 601, 28 L. J. C. P. 170; *Dutton v. Marsh* (1871) L. R. 6 Q. B. 361, 40 L. J. Q. B. 175. See now Bills of Exchange Act, 1882, s. 91, sub-s. 2.

(*y*) *Goodwin v. Roberts* (1876) Ex. Ch., L. R. 10 Ex. 337, 1 App. Ca. 476, 45 L. J. Ex. 748.

(*z*) *Dixon v. Bovill* (1856) 3 Macq. 1. Such a contract may however be made assignable free from equities: *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.* (1877) 5 Ch. D. 205, 46 L. J. Ch. 418.

(*a*) *Goodwin v. Roberts*, note (*y*)

supra, overruling *Crouch v. Crédit Foncier* on this point; *Rumball v. Metropolitan Bank* (1877) 2 Q. B. D. 194, 46 L. J. Q. B. 346.

(*b*) *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658, 67 L. J. Q. B. 986. This decision of Kennedy J. has been criticized by Mr. Bosanquet K.C. but supported by Mr. F. B. Palmer, L. Q. R. xv. 130, 245.

(*c*) *Gorgier v. Mieville* (1824) 3 B. & C. 45, 27 R. R. 290. Negotiability in a foreign market is not enough: *Picker v. London and County Banking Co.* (1887) 18 Q. B. Div. 515.

(*d*) *Goodwin v. Roberts* (1876) L. R. 10 Ex. 76, affd. in Ex. Ch. *ib.* 337, in H. L. 1 App. Ca. 476, 45 L. J. Ex. 748.

recognized as negotiable by our Courts though they do not satisfy all the conditions of an English negotiable instrument (*e*).

Negotiability by estoppel.

From what was said in *Goodwin v. Roberts* (*f*) in the House of Lords it seems that where the holder of an instrument purporting on the face of it to be negotiable, and in fact usually dealt with as such, intrusts it to a broker or agent who deals with it in the market where such usage prevails, he is estopped from denying its negotiable quality as against any one who in good faith and for value takes it from the broker or agent. But where a person takes documents of value, negotiable or not, from one whom he knows to be an agent having limited authority, he must at his own peril ascertain what that authority is; and this whether his knowledge be derived from the principal or not (*g*).

How instruments may cease to be negotiable.

It is also to be observed that an instrument which has been negotiable may cease to be so in various ways, namely—

Payment by the person ultimately liable (*h*).

Restrictive indorsement (*i*).

Crossing with the words “not negotiable” (*k*).

To a certain extent, in the case of bills payable to order, indorsement when overdue, which makes the indorsee's rights subject to what are called equities attaching to the bill itself, *e. g.* an agreement between the original parties to the bill that in certain events the acceptor shall not

(*e*) See *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. at pp. 384-5; *Goodwin v. Roberts*, 1 App. Ca. at pp. 494-5.

(*f*) 1 App. Ca. 486, 489, 493, 497.

(*g*) *Earl of Sheffield v. London Joint Stock Bank* (1888) 13 App. Ca. 333, 57 L. J. Ch. 986. This applies only where there is actual knowledge of the limited authority: *London Joint Stock Bank v. Simmons* [1892] A. C. 201, 61 L. J. Ch. 723.

(*h*) *Lazarus v. Cowie* (1842) 3

Q. B. 464. As to the possibility of suing on a bill after it has been paid by some other person, see *Cook v. Lister* (1863) 13 C. B. N. S. 543, 32 L. J. C. P. 121.

(*i*) Bills of Exchange Act, 1882, ss. 35, 36.

(*k*) Bills of Exchange Act, 1882, s. 77. A person taking a cheque so crossed has not and cannot give a better title than the person from whom he took it: s. 81. The practice of crossing cheques is unknown in America.

be held liable, but not to collateral equities such as set-off (*l*).

We have purposely left to the last the consideration of certain important classes of contracts which may be roughly described as involving the transfer of duties as well as of rights. This happens in the cases

Transfer of contracts where duties as well as rights transferred.

(A) Of transferable shares in partnerships and companies.

(B) Of obligations (*m*) attached to ownership or interests in property.

A. The contract of partnership generally involves personal confidence, and is therefore of a strictly personal character. But, "if partners choose to agree that any of them shall be at liberty to introduce any other person into the partnership, there is no reason why they should not: nor why, having so agreed, they should not be bound by the agreement" (*n*). At common law the number of persons engaged in a contract of partnership does not make any difference in the nature or validity of the contract; hence it follows that if in a partnership of two or three the share of a partner may be transferred on terms agreed on by the original partners, there is nothing at common law to prevent the same arrangement from being made in the case of a larger partnership, however numerous the members may be; in other words, unincorporated companies with transferable shares are not unlawful at common law. But this, as Lord Lindley observes, is now only of historical interest (*o*).

(A) Partnerships: Shares in ordinary partnerships and unincorporated companies may be made transferable at common law.

At first sight this may seem to involve the anomaly of

But no uncertain

(*l*) See *Ex parte Swan* (1868) L. R. 6 Eq. 344, 359, where the authorities are discussed.

(*m*) We use the word here in its wide sense so as to denote the benefit or burden of a contract, or

both, according to the nature of the case.

(*n*) Lindley on Partnership, 368.

(*o*) Lindley on Companies, 130-135.

contract
and no real
anomaly
in this.

a floating contract between all the members of the partnership for the time being, who by the nature of the case are unascertained persons when we look to any future time (*p*). But there is no need to assume any special exception from the ordinary rules of contract. It was pointed out by Lord Westbury that the transfer of a share in a partnership at common law is strictly not the transfer of the outgoing partner's contract to the incoming partner, but the formation of a new contract. "By the ordinary law of partnership as it existed previously to" the Companies Acts "a partner could not transfer to another person his share in the partnership. Even if he attempted to do so with the consent of the other partners, it would not be a transfer of his share, it would in effect be the creation of a new partnership" (*q*). This therefore is to be added to the cases in which we have already found apparent anomalies to vanish on closer examination.

Practical
difficulties
of unincor-
porated
companies
would re-
main, even
apart from
compul-
sory pro-
visions
of Com-
panies
Act.

Notwithstanding the theoretical legality of unincorporated companies, there does not appear to be any very satisfactory way of enforcing either the claims of the company against an individual member (*r*), or those of an individual member against the company (*s*). But the power of forming such companies is so much cut short by the Companies Act, 1862, which renders (with a few exceptions) unincorporated and unprivileged (*t*) partnerships of more than twenty (*u*) persons positively illegal, that questions of this kind have lost practical importance in this country. In like manner the transfer of shares in

(*p*) Cp. per Abbott C. J. in *Josephs v. Pebrer* (1825) 3 B. & C. 639, 643. This line of objection, however, does not appear to have been distinctly taken in any of the cases where the legality of joint-stock companies was discussed.

(*q*) *Webb v. Whiffin* (1872) L. R. 5 H. L. 711, 727, 42 L. J. Ch. 161.

(*r*) We have seen (*supra*, p. 216) that they cannot empower an officer

to sue on behalf of the association.

(*s*) See *Lyon v. Haynes* (1843) 5 M. & Gr. 504. A partner can now sue or be sued by the partnership in the firm-name. See Ord. XLVIII. rr. 1, 10.

(*t*) *i.e.* such as but for the Act would have been mere partnerships at common law.

(*u*) Ten in the case of banking: Companies Act, 1862, s. 4.

companies as well as their original formation is almost entirely governed by modern statutes.

B. Obligations *ex contractu* attached to ownership or interests in property are of several kinds. With regard to those attached to estates and interests in land, which alone offer any great matter for observation, the discussion of them in detail is usually and conveniently treated as belonging to the law of real property. There are however matters of general principle to be noted, and misunderstanding to be avoided, as to the respective methods of common law and equity in dealing with burdens imposed on the use of land by contract. (B) Obligations attached to property.

A preliminary statement in a summary form may be useful.

OBLIGATIONS ATTACHED TO OWNERSHIP AND INTERESTS IN PROPERTY.

General view thereof.

I. GOODS.

A contract cannot be annexed to goods so as to follow the property in the goods either at common law (*x*) or in equity (*y*).

By statute 18 & 19 Vict. c. 111 the indorsement of a bill of lading operates as a legal transfer of the contract, if and whenever by the law merchant it operates as a transfer of the property in the goods.

II. LAND (*z*).

α. Relations between landlord and tenant on a demise.

Burden :

of lessee's covenants

As to an existing thing parcel of the demise, assignees are bound whether named or not.

As to something to be newly made on the premises, assignees are bound only if named (*a*).

(*x*) 3rd resolution in *Spencer's case*, 1 Sm. L. C. 65; *Splidt v. Bowles* (1808) 10 East 279, 10 R. R. 296. "In general contracts do not by the law of England run with goods": Blackburn on Sale, 276.

(*y*) *De Mattos v. Gibson* (1858) 4 De G. & J. 276, 295.

(*z*) On this generally see Dart

V. & P. 2. 862 *sqq.*; 3rd Report of R. P. Commission, Dav. Conv. 1. 122 (4th ed.); and above all the notes to *Spencer's case* in 1 Sm. L. C.; and also as to covenants in leases the notes to *Thursby v. Plant*, 1 Wms. Saund. 278-281, 299, 305.

(*a*) As to this distinction, see 1 Sm. L. C. 67 *sqq.*

PERSONS AFFECTED BY CONTRACT.

Burden—continued.

of lessor's covenants

runs with the reversion.

(32 Hen. VIII. c. 34.)

Benefit :

of lessee's covenants

runs with the reversion.

(32 Hen. VIII. c. 34.)

The statute of Hen. VIII. applies only to demises under seal (*b*), and includes (by construction in *Spencer's case*) only such covenants as *touch and concern the thing demised* (*c*). It applies only to the reversion which the covenantor had at the time of entering into the covenant (*d*).

of lessor's covenants

runs with the tenancy.

See also 44 & 45 Vict. c. 41, ss. 10, 11, 58.

Note.

- (i) The lessee may safely pay rent (*e*) to his lessor so long as he has no notice of any grant over of the reversion: 4 & 5 Anne c. 3 [in Rev. Stat. : *al* 4 Anne c. 16], which is in fact a declaration of common law: see per Willes J., L. R. 5 C. P. 594.
- (ii) The lessee may still be sued on his express covenants (though under the old practice he could not be sued *in debt* for rent) after an assignment of the term (*f*).
- (iii) The doctrine concerning a reversion in a term of years is the same as concerning a freehold reversion (*g*).
- (iv) Where the statute of Henry VIII. does not apply, the assignee of the reversion cannot sue an original lessee who has assigned over all his estate, there being neither privity of estate nor privity of contract (*h*).

β. Mortgage debts.

The transfer of a mortgage security operates *in equity* as a transfer of the debt (*i*). Notice to the mortgagor is not needed to make the assign-

(*b*) *e.g.* *Smith v. Eggington* (1874) L. R. 9 C. P. 145, 43 L. J. C. P. 140.

(*c*) For the meaning of this see 1 Sm. L. C. 65; *Fleetwood v. Hull* (1889) 23 Q. B. D. 35, 58 L. J. Q. B. 341.

(*d*) *Muller v. Trafford* [1901] 1 Ch. 54, 70 L. J. Ch. 72.

(*e*) In the case of the lessee's covenants other than for payment of rent, an assignee of the reversion is not bound to give notice of the assignment to the lessee as a condition precedent to enforcing his

rights: *Scaltock v. Harston* (1875) 1 C. P. D. 106, 45 L. J. C. P. 125.

(*f*) 1 Sm. L. C. 24, 1 Wms. Saund. 298.

(*g*) 1 Sm. L. C. 74, 75.

(*h*) *Allcock v. Moorhouse* (1882) 9 Q. B. Div. 366.

(*i*) This is one of the cases in which the equitable transfer of a debt is not made = a legal transfer by the Judicature Act, 1873. In practice an express assignment of the debt is always added: the old power of attorney however is now superfluous.

ment valid ; but without such notice the assignee is bound by the state of the accounts between mortgagor and mortgagee (*k*).

γ. Rent-charges and annuities imposed on land independently of tenancy or occupation (*l*).

An agreement to grant an annuity charged on land implies an agreement to give a personal covenant for payment (*m*) ; but by a somewhat curious distinction the burden of a covenant to pay a rent-charge does *not* run with the land charged, nor does the benefit of it run with the rent (*n*).

δ. Other covenants not between landlord and tenant, relating to land and entered into *with* the owner of it.

The benefit runs with the covenantee's estate so that an assignee can sue at common law. The lessee for years of the covenantee may enforce the covenant as an assign if assigns are named (*o*). It is immaterial whether the covenantor was the person who conveyed the land to the covenantee or a stranger (*p*). The usual vendor's covenants for title come under this head. It is doubtful whether a *bona fide* purchaser from a purchaser who obtained his conveyance by fraud can in any circumstances sue on the former vendor's covenants for title (*q*).

ε. The like covenants entered into *by* the owner.

The burden of such covenants appears on the whole *not* to run with the land in any case at common law (*r*). But where a right or easement affecting land—such as a right to get minerals free from the ordinary duty of not letting down the surface—is granted subject to the duty of paying compensation for damage done to the land by the exercise of the

(*k*) *Jones v. Gibbons* (1864) 9 Ves. 407, 411, 7 R. R. 247 ; *Matthews v. Wallwyn* (1798) 4 Ves. 118, 126.

(*l*) These must be regarded as arising from contract (we do not speak of rents or services incident to *tenure*) : the treatment of rent-charges in English law as real rights or incorporeal hereditaments seems arbitrary. For a real right is the power of exercising some limited part of the rights of ownership, and is quite distinct from the right to receive a fixed payment without the immediate power of doing any act of ownership on the property on which the payment is secured.

(*m*) *Bower v. Cooper* (1842) 2 Ha. 408, 11 L. J. Ch. 287.

(*n*) 1 Wms. Saund. 303.

(*o*) *Taite v. Gosling* (1879) 11 Ch. D. 273, 48 L. J. Ch. 397.

(*p*) *Contra* Sugd. V. & P. 584-5, but alone among modern writers. The cases from the Year Books relied on by Lord St. Leonards (*Pakenham's case*, H. 42 E. III. 3, pl. 14 ; *Horne's case*, M. 2 H. IV. 6, pl. 25) seem to show only that it was once thought doubtful whether the assignee could sue without being also *heir* of the original covenantee. See also O. W. Holmes, *The Common Law*, 395, 404.

(*q*) *Onward Building Society v. Smithson* [1893] 1 Ch. 1, 15, 62 L. J. Ch. 138, C. A.

(*r*) 3rd report of R. P. Commissioners, in 1 Dav. Conv. *Austerberry v. Corporation of Oldham* (1885) 29 Ch. Div. 750, 55 L. J. Ch. 633 ; Farwell J. in *Rogers v. Hosegood* [1900] 2 Ch. 388, 395 ; 69 L. J. Ch. 59.

right, there the duty of paying compensation runs at law with the benefit of the grant. Here, however, the correct view seems to be that the right itself is a qualified one—*viz.* to let down the surface, &c., paying compensation, and not otherwise (*s*).

The burden is said to run with the land in equity (*t*) (subject to the limitation to be mentioned) in this sense, that a court of equity will enforce the covenant against assignees who have actual or constructive (*u*) notice of it; and when the covenant is for the benefit of other land (as in practice is commonly the case) the benefit generally though not always runs with that other land.

Explanation. Let us call the land on the use of which a restriction is imposed by covenant the *quasi-servient* tenement, and the land for whose benefit it is imposed the *quasi-dominant* tenement. Now restrictive covenants may be entered into

- (1) By a vendor as to the use of other land retained or simultaneously sold, for the benefit of the land sold by him :

In this case the burden runs with the quasi-servient tenement and the benefit also runs with the quasi-dominant tenement.

- (2) By a purchaser as to the use of the land purchased by him, for the benefit of other land retained or simultaneously sold by the vendor :

In this case the burden runs with the quasi-servient tenement, and the benefit *may* run with the quasi-dominant tenement when such is the intention of the parties, and especially when a portion of land is divided into several tenements and dealt with according to a prescribed plan (*v*).

All these rights and liabilities being purely equitable are like all other equitable rights and liabilities subject to the rule that purchase for value without notice is an absolute defence. An assign of a covenantee may be entitled to the benefit of the covenant without having known of it at the date of his purchase : the question is whether he acquired it as annexed to the land (*x*).

Further, this doctrine applies only to restrictive, not to affirmative covenants. Thus it does not apply to a covenant to repair. "Only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice" (*y*).

(*s*) *Aspden v. Seddon* (1876) 1 Ex. Div. 496, 509, 46 L. J. Ex. 353.

(*t*) The phrase is not free from objection : see per Rigby L.J. [1900] 2 Ch. at p. 401.

(*u*) *Wilson v. Hart* (1866) L. R. 1 Ch. 463 ; *Patman v. Harland* (1881) 17 Ch. D. 353, 50 L. J. Ch. 642.

(*v*) *Keates v. Lyon*, L. R. 4 Ch. 218, 38 L. J. Ch. 357, and other cases there considered ; *Harrison v. Good* (1871) L. R. 11 Eq. 338, 40

L. J. Ch. 294 ; *Renals v. Cowlishaw* (1878) 9 Ch. D. 125, 11 Ch. Div. 866, 48 L. J. Ch. 830 ; *Spicer v. Martin* (1888) 14 App. Ca. 12, 58 L. J. Ch. 309 ; *Rogers v. Hosegood*, [1900] 2 Ch. 388, 69 L. J. Ch. 652, C. A.

(*x*) *Rogers v. Hosegood*, last note.

(*y*) *Lindley L.J. Haywood v. Brunswick Building Society* (1881) 8 Q. B. Div. 403, 410, 51 L. J. Q. B. 73 ; *L. & S. W. Ry. Co. v. Gomm*, 20 Ch. Div. 562, 51 L. J. Ch. 530 ;

The only points which seem to call for more notice here are the doctrines as to bills of lading (I.) and restrictive covenants as to the use of land (II. ε). Further remarks : as to bills of lading.

As to (I.) it is to be borne in mind that bills of lading are not properly negotiable instruments, though they may be called so "in a limited sense as against stoppage *in transitu* only" (z). As far as the law merchant goes the bill of lading only represents the goods, and does not enable any one who gets it into his hands to give a better title than his own to a transferee; "the transfer of the symbol does not operate more than a transfer of what is represented" (a). And the whole effect of the statute is to attach the rights and liabilities of the shipper's contract not to the symbol, but to the property in the goods themselves (b): the right to sue on the contract contained in the bill of lading is made to "follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser" (c).

As to (II. ε) the theory of the common law is to the following effect. The normal operation of a contract, as we have already had occasion to say, is to limit or cut short in some way the contracting party's control over his own actions. Among other kinds of actions the exercise of rights of ownership over a particular portion of property may be thus limited. So far then an owner "may bind himself by covenant to allow any right he pleases over his property" (d) As to burden of covenants running with land difference between C. L. and Equity on this. Treatment of the question at C. L.

Austerberry v. Corporation of Oldham, note (r), p. 237, above; *Hall v. Ewin* (1887) 37 Ch. Div. 74, 57 L. J. Ch. 95.

(z) Per Willes J. *Fuentes v. Montis* (1868) L. R. 3 C. P. at p. 276, 38 L. J. C. P. 95.

(a) *Gurney v. Behrend* (1854) 3 E. & B. 622, 633, 23 L. J. Q. B. 265.

(b) *Fox v. Nott* (1861) 6 H. & N. 630, 636, 30 L. J. Ex. 259; *Smurthwaite v. Wilkins* (1862) 11 C. B. N. S. 842, 850, 31 L. J. C. P. 214.

(c) *The Freedom*, L. R. 3 P. C. 594, 599. As to indorsement by way of pledge, see *Sewell v. Burdick* (1884) 10 App. Ca. 74, 103.

(d) *Hill v. Tupper* (1863) 2 H. & C. 121, 127, 32 L. J. Ex. 217.

or to deal with it in any way not unlawful or against public policy (*e*). But if it be sought to annex such an obligation to the property itself, this is a manifest departure from the ordinary rules of contract. An obligation attached to property in this manner ceases to be only a burden on the freedom of the contracting party's individual action, and becomes practically a burden on the freedom of ownership. Now the extent to which the law will recognize such burdens is already defined. Certain well-known kinds of permanent burdens are imposed by law, or may be imposed by the act of the owner, on the use of land, for the permanent benefit of other land: these, and these only, are recognized as being necessary for the ordinary convenience of mankind, and new kinds cannot be admitted. And this principle, it may be observed, is not peculiar to the law of England (*f*). Easements and other real rights *in re aliena* cannot therefore be extended at the arbitrary discretion of private owners: "it is not competent for an owner of land to render it subject to a new species of burden at his fancy or caprice" (*g*). Still less is it allowable to create new kinds of tenure or to attach to property incidents hitherto unknown to the law. But if it is not convenient or allowable that these things should be done directly in the form of easements, neither is it convenient or allowable that they should be done indirectly in the form of obligations created by contract but annexed to ownership. If the

(*e*) It is not unlawful for a landowner to let all his land lie waste; but a covenant to do so would probably be invalid.

(*f*) Cp. Savigny, *Obl.* 1. 7; and for a singular coincidence in detail, *D. 8. 3. de serv. praed. rust.* 5 § 1, 6 *pr.* = *Clayton v. Corby* (1843) 5 Q. B. 415, 14 L. J. Q. B. 364.

(*g*) Per Martin B. *Nuttall v. Bracewell* (1866) L. R. 2 Ex. 10, 36 L. J. Ex. 1; for the C. L. principles generally, see *Ackroyd v. Smith* (1850) 10 C. B. 164, 19 L. J. C. P. 315; *Bailey v. Stephens* (1862) 12

C. B. N. S. 91, 31 L. J. C. P. 226. Rights of this kind are to be carefully distinguished from those created by grants in gross; see per Willes J. *ib.* 12 C. B. N. S. 111. The Courts might have held that new negative easements might be created, but not positive ones, but this solution does not seem to have ever been proposed; and the whole subject of negative easements is still obscure, as is shown by the widely different opinions held in *Dalton v. Angus* (1881) 6 App. Ca. 740, 50 L. J. Q. B. 689.

burden of restrictive covenants is to run with land, people can practically create new easements and new kinds of tenure to an indefinite extent. Such appears to be the view of legal policy on which the common law doctrine rests (*h*).

The history of the doctrine in the Court of Chancery is somewhat curious. Lord Brougham, in an elaborate judgment which seems to have been intended to settle the question (*i*), treated what we have called the common law theory as final, and, ignoring the difference between positive and negative covenants, broadly laid down that where a covenant does not run with the land at law, an assignee cannot be affected by notice of it. But this judgment, though treated as an authority in courts of law (*k*), has never been followed in courts of equity. After being disregarded in two reported cases (*l*) it was overruled by Lord Cottenham in *Tulk v. Moxhay* (*m*), now the leading case on the subject. The most important of the recent cases are *Keates v. Lyon* (*n*) (where the authorities are collected), *Haywood v. Brunswick Building Society* (*o*), which explicitly decided that the rule applies only to negative covenants, and *Nottingham Brick Co. v. Butler* (*p*). When a vendor sells land in building lots and takes restrictive covenants in identical terms from the several purchasers, not entering into any covenant himself, it is a question of fact whether these covenants are meant to operate for the protection of purchasers as

(*h*) See per Willes J. delivering the judgment of the Ex. Ch. in *Dennett v. Atherton* (1872) L. R. 7 Q. B. 316, 325.

(*i*) *Keppell v. Bailey* (1834) 2 M. & K. 517, 527, 39 R. R. 264, 270; and see the preface to that volume.

(*k*) *Hill v. Tupper* (1863) 2 H. & C. 121, 32 L. J. Ex. 217.

(*l*) *Whatman v. Gibson* (1838) 9 Sim. 196, 47 R. R. 214; *Mann v. Stephens* (1846) 15 Sim. 377.

(*m*) (1848) 2 Ph. 774. See per Fry J. in *Luker v. Dennis* (1877) 7 Ch. D. 227, at pp. 235, 236, 47 L. J. Ch. 174.

(*n*) (1869) L. R. 4 Ch. 218, 38 L. J. Ch. 357.

(*o*) (1881) 8 Q. B. Div. 403, 51 L. J. Q. B. 73.

(*p*) (1886) 16 Q. B. Div. 778. For the corresponding Scottish doctrine, see *Hislop v. Leckie* (1881) 6 App. Ca. 560.

between themselves, or as against the vendor in his dealings with parcels retained by him (*q*). Where such is the intention, any purchaser can enforce the restriction against any other purchaser, or his assigns having notice, or the vendor as the case may be, nor can the vendor release the covenant to any purchaser or his successors in title without the consent of all the rest (*r*).

The foundation of the equitable doctrine.

The result of the equitable doctrine is in practice to enable a great number and variety of restrictions to be imposed on the use of land for an indefinite time, subject to the contingency of a purchase for value without notice of the restriction (*s*). But equity does not profess to enforce a restrictive covenant on a purchaser with notice as being a constructive party to the covenant; it only restrains him from using the land in a manner which would be unconscientious as depriving the covenantee of his effectual remedy (*t*). So far as common law remedies go, covenants of this kind can be always or almost always evaded; if the equitable remedy by injunction were confined to the original covenantor, that also could be evaded by a collusive assignment. On this principle however an assign cannot be and is not made answerable for the active performance of his predecessor's covenant: he can only be expected not to prevent its performance. Hence the decisions to that effect which have been

(*q*) *Re Birmingham and District Land Co. v. Allday* [1893] 1 Ch. 342, 62 L. J. Ch. 90. As to what is sufficient evidence of a "building scheme," *Tucker v. Vowles* [1893] 1 Ch. 195, 62 L. J. Ch. 172. The vendor's taking restrictive covenants and not reserving any part of the property is strong affirmative evidence, but his reservation of part is by no means conclusive the other way.

(*r*) See *Spicer v. Martin* (1888) 12 App. Ca. 12, 23, 58 L. J. Ch. 309, per Lord Macnaghten, approving the statement of Hall V.C. in *Renals v. Cowlshaw*, 9 Ch. D. 125, 129. As to the effect of a pur-

chaser of lots in a building estate under a restrictive scheme forming a "sub-scheme" by re-selling portions under new conditions, see *Knight v. Simmons* [1896] 2 Ch. 294, 65 L. J. Ch. 583, C. A.

(*s*) Where there has once been such a purchase, a subsequent purchaser cannot be affected by notice. See per Lindley L.J. 16 Q. B. Div. at p. 788.

(*t*) "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it": Rigby L.J. *Rogers v. Hosegood* [1900] 2 Ch. 388, 401; 69 L. J. Ch. 652.

cited (u). The jurisdiction is a strictly personal and restraining one. No rule of the law of contract is violated, for the assign with notice is not liable on the contract but on a distinct equitable obligation in his own person. Lord Brougham fell into the mistake of supposing that the covenant must be operative in equity, if at all, by way of giving effect to an intention to impose permanent burdens unknown to the law. Equity does not trouble itself to assist intentions which have no legal merits, and any such action, Lord Brougham rightly saw, was beyond its proper province. The law laid down in *Keppell v. Bailey* (x) was erroneous on this point, not from any defect of reasoning in the judgment, but because the reasoning proceeded on an erroneous assumption.

The true principle is further illustrated by the rule that even with notice an assign is not liable "where an alteration takes place through the acts or permission of the plaintiff or those under whom he claims, so that his enforcing his covenant becomes unreasonable" (y). Were the liability really on the covenant, nothing short of release or estoppel would avoid it. Change of conditions.

(u) See a note in L. Q. R. iv. 119 (not by the present writer) on *Hall v. Ewin*, 36 W. R. 84, 37 Ch. Div. 74, 57 L. J. Ch. 95, where the doctrine is well explained.

(x) 2 M. & K. 57, 39 R. R. 264. Other reasons with which we are not concerned here were given; the actual decision was perhaps also right on the ground that the covenant in question was not merely negative: see 39 R. R. 264, n.

(y) Fry L.J. in *Sayers v. Collyer*

(1884) 28 Ch. Div. 103, 109, 52 L. J. Ch. 770, explaining the limits of the rule as originally laid down in *Duke of Bedford v. Trustees of British Museum* (1822) 2 M. & K. 552, 39 R. R. 288. In New York this limitation seems not to be recognized: *Trustees v. Thacher* (1882) 87 N. Y. 311, where, the residential amenity of a street having been destroyed by the elevated railway, the Court refused to enforce a covenant against using the house for trade.

CHAPTER VI.

DUTIES UNDER CONTRACT.

1. *Interpretation generally.*

Necessity
of inter-
pretation.

WE have now gone through the general and necessary elements of a contract, and shall hereafter consider the further causes which may annul or restrain its normal effect. This work is not directly concerned with the rules of law which govern the construction, performance, and discharge of contracts. But we cannot apply the principles by which disputes as to the validity of an agreement have to be determined without first determining what the substance of the agreement is; and a dispute as to the original substance and force of a promise may often be resolved into a conflict on the less fundamental question of what is a sufficient performance of a promise admitted to be binding. A summary view of the leading rules of interpretation may therefore be found useful at this stage. We suppose an agreement formed with all the positive requisites of a good contract; and we proceed to ascertain what are the specific duties created by this agreement.

Measure of
promisor's
duty.

If there be not any special cause of exception, the promisor must fulfil the obligation which his own act has created. He must perform his promise according to its terms. Here there are two distinct elements of which either or both may be more or less difficult to ascertain: first the terms in which the promise was made, and then the true sense and effect of those terms. The former must be determined by proof or admission, the latter by

interpretation, which, however, may have to take account of specific facts other than those by which the promise itself is established. We assume the terms to be reduced to a form in which the Court can understand them, as for example by translation from any language of which the Court does not assume judicial knowledge, or by explanation of terms of art in sciences other than the law, which is really a kind of translation out of the language of specialists.

The nature of a promise is to create an expectation in the person to whom it is made. And, if the promise be a legally binding one, he is entitled to have that expectation fulfilled by the promisor. It has, therefore, to be considered what the promisor did entitle the promisee to expect from him. Every question which can arise on the interpretation of a contract may be brought, in the last resort, under this general form.

Expecta-
tion of
promisee.

In order to ascertain what the promisee had a right to expect, we do not look merely to the words used. We must look to the state of things as known to and affecting the parties at the time of the promise, including their information and competence with regard to the matter in hand, and then see what expectation the promisor's words, as uttered in that state of things, would have created in the mind of a reasonable man in the promisee's place and with the same means of judgment (a). The reasonable expectation thus determined gives us the legal effect of the promise.

Now this measure of the contents of the promise will be found to coincide, in the usual dealings of men of good faith and ordinary competence, both with the actual intention of the promisor and with the actual expectation of the promisee. But this is not a constant or a necessary coincidence. In exceptional cases a promisor may be

Reason-
able effect
of promise
on pro-
misee.

(a) See per Blackburn J. *Smith v. Hughes* (1871) L. R. 6 Q. B. 597, 607, 40 L. J. Q. B. 221; *Birrell v. Dryer* (1884) 9 App. Ca. 345.

bound to perform something which he did not intend to promise, or a promisee may not be entitled to require that performance which he understood to be promised to him. The problem has been dealt with by moralists as well as by lawyers. Paley's solution is well known, and has been quoted by text-writers and in Court (*b*): "where the terms of promise admit of more senses than one, the promise is to be performed in that sense in which the promiser apprehended at the time that the promisee received it." But this does not exactly hit the mark. Reflection shows that, without any supposition of fraud, Paley's rule might in peculiar cases (and only for such cases do we need a rule) give the promisee either too much or too little. And Archbishop Whately, a writer of great acuteness and precision within the limits he assigned to himself, perceived and corrected the defect: "Paley," he says, "is nearly but not entirely right in the rule he has here laid down Every assertion, or promise, or declaration of whatever kind, is to be interpreted on the principle that the right meaning of any expression is that which may be *fairly presumed to be understood* by it" (*c*). And such is the rule of judicial interpretation as laid down and used in our Courts. "In all deeds and instruments"—and not less, when occasion arises, in the case of spoken words—"the language used by one party is to be construed in the sense in which it would be reasonably understood by the other" (*d*). All rules of construction may be said to be more or less direct applications of this principle. Many rules of evidence involve it, and in par-

(*b*) L. R. 6 Q. B. 600, 610.

(*c*) Paley, *Moral Phil.* bk. 3, pt. 1, c. 5; Whately thereon in notes to ed. 1859. I am indebted to my learned friend Mr. A. V. Dicey for calling my attention to Whately's amendment. Austin's attempt (*Jurisprudence*, i. 456, ed. 1869) is nothing to the purpose. Some modern civilians have said,

with useless subtilty, that a promisor who has by his own fault caused the promisee to expect more than was meant is bound "*non ex vi promissionis sed ex damno per culpam dato.*"

(*d*) Blackburn J. in *Fowkes v. Manchester and London Assurance Association* (1863) 3 B. & S. 917, 929, 32 L. J. Q. B. 153, 159.

ticular its development in one special direction, extended from words to conduct, constitutes the law of estoppel *in pais*, which under somewhat subtle and technical appearances is perhaps the most complete example of the power and flexibility of English jurisprudence.

We have already seen that the terms of an offer or promise may be expressed in words written or spoken, or conveyed partly in words and partly by acts, or signified wholly by acts without any use of words (*e*). For the purposes of evidence, the most important distinction is not between express and tacit significations of intention, but between writing and all other modes of manifesting one's intent. The purpose of reducing agreements to writing is to declare the intention of the parties in a convenient and permanent form, and to preclude subsequent disputes as to what the terms of the agreement were. It would be contrary to general convenience, and in the great majority of cases to the actual intention of the parties at the time, if oral evidence were admitted to contradict the terms of a contract as expressed in writing by the parties. Interpretation has to deal not with conjectured but with manifest intent, and a supposed intent which the parties have not included in their chosen and manifest form of expression cannot, save for exceptional causes, be regarded. Our law, therefore, does not admit evidence of an agreement by word of mouth against a written agreement in the same matter. The rule is not a technical one, and is quite independent of the peculiar qualities of a deed. "The law prohibits generally, if not universally, the introduction of parol evidence to add to a written agreement, whether respecting or not respecting land, or to vary it" (*f*). "If A. and B. make a contract in writing, evidence is not admissible to show that A. meant something different from what is stated in the

Agree-
ments
evidenced
by writ-
ing: rule
against
parol
variations.

(*e*) P. 11, above.

(*f*) *Martin v. Pycroft* (1852) 2

D. M. G. 785, 795, 22 L. J. Ch. 94.

contract itself, and that B. at the time assented to it. If that sort of evidence were admitted, every written document would be at the mercy of witnesses that might be called to swear anything" (g).

Rule of equity.

Under normal conditions the same rule prevails in equity, and this in actions for specific performance as well as in other proceedings, and whether the alleged variation is made by a contemporaneous (h) or a subsequent (i) verbal agreement. "Variations verbally agreed upon . . . are not sufficient to prevent the execution of a written agreement, the situation of the parties in all other respects remaining unaltered" (k).

Similarly, when a question arises as to the construction of a written instrument *as it stands*, parol evidence is not admissible (and was always inadmissible in equity as well as at law) to show what was the intention of the parties. A vendor's express contract to make a good marketable title cannot be modified by parol evidence that the purchaser knew there were restrictive covenants (l). It is otherwise where it is sought to *rectify* the instrument

(g) Per Pollock C.B. *Nichol v. Godts* (1854) 10 Ex. 191, 194, 23 L. J. Ex. 314. See also *Hotson v. Browne* (1860) 9 C. B. N. S. 442, 30 L. J. C. P. 106; *Halhead v. Young* (1856) 6 E. & B. 312, 25 L. J. Q. B. 290.

(h) *Omerod v. Hardman* (1801) 5 Ves. 722, 730. Lord St. Leonards (V. & P. 163) says this cannot be deemed a general rule: but see *Hill v. Wilson*, L. R. 8 Ch. 888; per Mellish L.J. at p. 899, 42 L. J. Ch. 817.

(i) *Price v. Dyer* (1810) 17 Ves. 356, 11 R. R. 102; *Robinson v. Page* (1826) 3 Russ. 114, 121, 27 R. R. 26. But a subsequent waiver by parol, if complete and unconditional, may be a good defence; *ib.*: *Goman v. Salisbury*, 1 Vern. 240; and *cp.* 6 Ves. 337a, note. *Qu.* if not also at law, if the contract be not under seal: see Dart V. & P. 1096. *Noble v. Ward* (1867) L. R. 2 Ex. 135,

does not prove that a verbal waiver of a written agreement is no defence at law, but only that a new verbal agreement intended to supersede an existing contract, but by reason of the Statute of Frauds incapable of being enforced, cannot operate as a mere rescission of the former contract; the ground being that there is nothing to show any intention of the parties to rescind the first contract absolutely.

(k) *Price v. Dyer* (1810) 17 Ves. at p. 364, 11 R. R. 107; *Clowes v. Higginson* (1813) 1 Ves. & B. 524, 12 R. R. 284, where it was held (1) that evidence was not admissible to explain, contradict, or vary the written agreement, but (2) that the written agreement was too ambiguous to be enforced.

(l) *Cato v. Thompson* (1882) 9 Q. B. Div. 616. In such a case the true intention may well be that the vendor shall remove the defect.

under the peculiar equitable jurisdiction which will be described in a later chapter. And therefore the Court has in the same suit refused to look at the same evidence for the one purpose and taken it into account for the other (*m*).

It is no real exception to this rule that though “evidence to vary the terms of an agreement in writing is not admissible,” yet “evidence to show that there is not an agreement at all is admissible,” as where the operation of a writing as an agreement is conditional on the approval of a third person (*n*) or on something to be done by the other party (*o*). “A written contract not under seal is not the contract itself, but only evidence—the record of the contract. When the parties have recorded their contract, the rule is that they cannot alter or vary it by parol evidence. They put on paper what is to bind them, and so make the written document conclusive evidence between them. But it is always open to the parties to show whether or not the written document is the binding record of the contract” (*p*).

Apparent exceptions at law and in equity.

“The rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper beyond question binding and of full effect” (*q*). It may even be shown that what appears to be a deed was delivered as an escrow, notwithstanding that a deed once fully delivered is conclusive (*r*). Still less does the rule apply to proof of the circumstances in which a document was signed which was not really part of the

(*m*) *Bradford v. Romney* (1862) 30 Beav. 431, cp. per Lindley L.J. 9 Q. B. Div. 620.

(*n*) *Pym v. Campbell* (1856) 6 E. & B. 370, 374, 25 L. J. Q. B. 277.

(*o*) *Pattle v. Hornibrook* [1897] 1 Ch. 25, 66 L. J. Ch. 144.

(*p*) Per Bramwell B. *Wake v. Harrop* (1861-2) 6 H. & N. at p. 775, 30 L. J. Ex. at p. 277; cp. *Wace v. Allen* (1888) 128 U. S.

590.

(*q*) *Guardhouse v. Blackburn* (1866) L. R. 1 P. & D. 109, 115, 35 L. J. P. 116. And see per Page Wood V.-C. in *Druiff v. Lord Parker* (1868) L. R. 5 Eq. 131, 137, 37 L. J. Ch. 241.

(*r*) See *Watkins v. Nash* (1875) L. R. 20 Eq. 262; *Whelan v. Palmer* (1888) 39 Ch. D. 648, 655, 57 L. J. Ch. 784.

agreement at all, but only a memorandum made at the same time or immediately after (s).

So in *Jervis v. Berridge* (t) it was held that a document purporting to be a written transfer of a contract for the purchase of lands "was . . . not a contract valid and operative between the parties but omitting (designedly or otherwise) some particular term which had been verbally agreed upon, but was a mere piece of machinery . . . subsidiary to and for the purposes of the verbal and only real agreement." And since the object of the suit was not to enforce the verbal agreement, nor "any hybrid agreement compounded of the written instrument and some terms omitted therefrom," but only to prevent the defendant from using the written document in a manner inconsistent with the real agreement, there was no difficulty raised by the Statute of Frauds, "which does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties." If it appears that a document signed by the parties, and apparently being the record of a contract, was not in fact intended to operate as a contract, then "whether the signature is or is not the result of a mistake is immaterial" (u).

Collateral
parol
agree-
ments.

Again it has been held, and that by Courts of common law not having equity jurisdiction, that even where there is an agreement by deed a collateral agreement not inconsistent with the written terms may be shown. For such a collateral agreement, moreover, the promisee's execution of the principal writing or deed is consideration

(s) *Bank of Australasia v. Palmer* [1897] A. C. 540, 66 L. J. P. C. 105, J. C.

(t) (1873) L. R. 8 Ch. 351, 359, 360, 42 L. J. Ch. 518; *Clarke v. Grant* (1807) 14 Ves. 519, 9 R. R. 336, appears really to belong to this class.

(u) Per Bramwell B. *Rogers v.*

Hadley (1863) 2 H. & C. 227, 249, 32 L. J. Ex. 241. In this case there was "a real contract not in writing and a paper prepared in order to comply with some form, which was stated at the time to contain a merely nominal price." Cp. *Bank of Australasia v. Palmer*, note (s), above.

enough (*x*), in the same way as on a sale of goods no distinct consideration is required for a simultaneous collateral warranty.

Another class of cases in which an apparent, or sometimes, perhaps, a real exception occurs, is that in which external evidence is admitted to explain the meaning in which particular terms in a contract were understood by the parties, having regard to the language current in that neighbourhood or among persons dealing in that kind of business. Witnesses have been allowed, in this way, to prove that by local custom "a thousand" of rabbits was 1,200 (*i. e.*, ten long hundreds of six score each, the old "Anglicus numerus" of Anglo-Norman surveys) (*y*); to show what was meant by "weekly accounts" among builders (*z*); to define "year," in a theatrical contract to pay a weekly salary for three years, as meaning only the part of the year during which the theatre was open (*a*); to identify the wool described as "your wool" in a contract to buy wool (*b*).

Evidence to explain particular terms.

The theory is that such evidence is admitted "not to contradict a document, but to explain the words used in it, supply, as it were, the mercantile dictionary in which you are to find the mercantile meaning of the words which are used" (*c*) (or other meaning received by persons in the condition of the parties, as the case may be). The process may be regarded as an extension of the general rule that words shall have their primary meaning. For when words are used by persons accustomed to use them technically,

Not contradictory but auxiliary to the writing.

(*x*) *Erskine v. Adeane* (1873) L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Morgan v. Griffith* (1871) L. R. 6 Ex. 70, 40 L. J. Ex. 46 (agreement by lessor to keep down rabbits); *Angell v. Duke* (1875) L. R. 10 Q. B. 174 (agreement to do repairs and send in furniture); see [1901] 2 K. B. at p. 223; *De Lassalle v. Guildford* [1901] 2 K. B. 215, 70 L. J. K. B. 533, C. A. (warranty of drains in good order).

(*y*) *Smith v. Wilson* (1832) 3 B. & Ad. 728, 37 R. R. 536.

(*z*) *Myers v. Sarl* (1860) 3 E. & E. 306, 30 L. J. Q. B. 9.

(*a*) *Grant v. Maddox* (1846) 15 M. & W. 737, 16 L. J. Ex. 227.

(*b*) *Macdonald v. Longbottom*, Ex. Ch. 1859-60, 1 E. & E. 977, 28 L. J. Q. B. 293, 29 *ib.* 256.

(*c*) Lord Cairns, *Bowes v. Shand* (1877) 2 App. Ca. 455, 468.

the technical meaning is for those persons at any rate the primary meaning (*d*). It is a question not of adding or altering, but of identifying the subject-matter. "Suppose that I sell 'all my wool which I have on Dale Farm,' evidence must always be admissible to show that the wool which was delivered was the wool on Dale Farm" (*e*). The terms thus explained need not be ambiguous on their face (*f*). Parol evidence is equally admissible to explain words in themselves ambiguous or obscure and to show, as in the case of "a thousand of rabbits," that common words were used in a special sense. "The duty of the Court . . . is to give effect to the intention of the parties. . . . It has always been held . . . that where the terms in the particular contract have, besides their ordinary and popular sense, also a scientific or peculiar meaning, the parties who have drawn up the contract with reference to that particular department of trade or business must fairly be taken to have intended that the words should be used not in their ordinary but in their peculiar sense" (*g*).

This kind of special interpretation must be kept distinct from the general power of the Court to arrive at the true construction of a contract by taking account of the material facts and circumstances proved or judicially known. The words "warranted no St. Lawrence" in a time policy of marine insurance have been decided, by reason of the known facts of geography and the nature and risks of the navigation, to include the Gulf of St. Lawrence as well as the river, notwithstanding the failure of an attempt to prove that such was the customary meaning (*h*). In another modern case the Court found

(*d*) See Elphinstone, Norton and Clark on Interpretation, 48, 57; and Sir Howard Elphinstone on "The Limits of Rules of Construction," L. Q. R. i. 466.

(*e*) Erle J. in *Macdonald v. Longbottom* (1859-60) 28 L. J. Q. B. at p. 297; cp. *Bank of New Zealand*

v. Simpson [1900] A. C. 182, 69 L. J. P. C. 22, J. C.

(*f*) See the judgment of Blackburn J. in *Myers v. Sarl*, above.

(*g*) Cockburn C.J. in *Myers v. Sarl* (1860) 30 L. J. Q. B. at p. 12.

(*h*) *Birrell v. Dryer* (1884) 9 App. Ca. 345. In *Johnson v. Raylton*

no difficulty in holding that, in the circumstances of the transaction, a guaranty for the price of goods to be supplied, definite as to the amount but otherwise loosely worded, must be read as a continuing guaranty and not as a guaranty confined to a single sale then about to be made (i).

The Courts have taken yet a further step in this line of interpretation by reference to unexpressed matter. Not only particular terms may be explained, but whole new terms (provided they be not inconsistent with the terms actually expressed in writing) may be added by proving those terms to be an accustomed part of such contracts, made between such persons, as the Court has before it. Custom, when the word is used in these cases, does not necessarily imply either antiquity or universality or any definite local range. It is merely a usage so general and well understood in fact, with reference to the business, place, and class of persons, that the parties are presumed to have made their contract with tacit reference to it, and to have intended to be governed by it in the same way and to the same extent as other like persons in like cases. The Court may act, it seems, on a proved change of usage within recent memory (k). It might perhaps be better not to use in this connexion the word "custom," which has a perfectly distinct meaning in the law of tenure and rights over land, or at least to speak by preference of "usage," except where the phrase "custom of trade" has become too familiar to be easily dropped. It would take us too far to enlarge upon this class of cases; it must suffice to indicate them and refer to a few leading authorities.

Incorporation of customary terms by parol evidence.

Rights allowed to agricultural tenants by the "custom Customs

(1881) 7 Q. B. Div. 438, 50 L. J. Q. B. 753, an implied warranty alleged to be customary was decided to be part of the general law.

(i) *Heffield v. Meadows* (1869) L. R. 4 C. P. 595.

(k) See per Channell J. in *Moult v. Halliday* [1898] 1 Q. B. at p. 130.

of the
country.

of the country," such as to take the away-going crop after the expiration of the term, to receive compensation for particular kinds of improvement, and the like, have been held for more than a century (*l*) not to be excluded by anything short of actual contradiction in the terms expressed between the parties, and this even where the contract is under seal. In recent cases of this class (*m*) the question has generally been whether something in the express terms was or was not so inconsistent with the usage as to exclude the presumption that "the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages" (*n*).

Of trade,
&c.

In the present century there have been a great number of decisions arising out of the usages current in trades and in various kinds of mercantile dealings and public employments. One strong application of the principle now before us has been to make agents or brokers in certain trades and markets personally liable (unconditionally or in some particular event) notwithstanding that they contracted only as agents (*o*). This has been thought to go too far, as adding to the written contract not merely a new term as between the same parties, but a new party. But the point is settled by an unbroken current of authority (*p*). Some important groups of cases have turned on particular rules and usages of the Stock Exchange, with regard especially to the determination of the persons on whom they were binding without individual assent or notice (*q*).

As it is not always easy to say where the ordinary

(*l*) The earliest case commonly cited is *Wigglesworth v. Dallison* (1778-81) Dougl. 201, 1 Sm. L. C. 528, where see the notes.

(*m*) As in *Tucker v. Linger* (1883) 8 App. Ca. 508, 52 L. J. Ch. 941. See per Lord Blackburn, 8 App. Ca. at p. 511.

(*n*) Parke B. in *Hutton v. War-*

ren, 1 M. & W. 466, 475, 46 R. R. 368, 377.

(*o*) *Humfrey v. Dale* (1857) E. B. & E. 1004, 26 L. J. Q. B. 137, and other cases cited p. 101, above.

(*p*) See 1 Sm. L. C. 543-545.

(*q*) See *Nickalls v. Merry* (1875) L. R. 7 H. L. 530.

construction of the language used in affairs ends, and explanation of special terms and senses by a "mercantile dictionary" as Lord Cairns called it (*r*), begins, so there is a more or less fluctuating boundary line, even now that the law merchant is part of the general law, between the establishment, by evidence of usage, of particular incidents of particular mercantile contracts, and the general development of mercantile law by the judicial recognition of universal custom.

Supposing the terms of the contract, express or incorporated by reference, to be finally established, there remains the task of construction in the stricter sense; namely of deciding, where the terms are capable of more than one meaning, which meaning is to be preferred. On this head there are few rules, if any, which are confined to contracts, or are more applicable to them than to instruments in writing generally. The one universal principle is that effect is to be given to the intention of the parties collected from their expression of it as a whole. It must be collected from the whole; that is, particular terms are to be construed in that sense which is most consistent with the general intention (*s*). It must also be collected from what is expressed, not from a mere conjecture of some intention which the parties may have had in their minds, and would have expressed if they had been better advised (*t*). This caution, however, does not prevent the correction of mistakes which are obvious on the face of the document. In such cases the general intent, as expressed by the immediate context, or collected from the whole scope of the instrument, is clear enough to overcome the difficulty arising from erroneous or defective expression in some part. Mere verbal blunders have always, in modern times

Construc-
tion pro-
per: pre-
ference of
general
intention
to particu-
lar terms.

(*r*) Page 251, above.

(*s*) See *Ford v. Beech* (1848) (Ex. Ch.) 11 Q. B. 852, 17 L. J. Q. B. 114.

(*t*) Jessel M.R. *Smith v. Lucas* (1881) 18 Ch. D. 531, 542; and see other authorities in Elphinstone, Norton and Clark on Interpretation, p. 37.

at any rate, been corrected without difficulty by the ordinary jurisdiction even of courts of common law (*u*). *Mala grammatica non vitiat chartam* (*x*). In construing instruments of well-known types, such as family settlements, even omitted clauses have often been supplied by aid of the context (*y*).

Limits of
rules of
construc-
tion.

For the rest, our Courts are now much less disposed to hold themselves bound by canons of construction than they were even one or two generations ago. "They were framed with a view to general results, but are sometimes productive of injustice by leading to results contrary to the intention of the parties" (*z*); and the recent tendency is to pay less attention to any such rules and more to all admissible indications of what the intention actually was in the case in hand, including the practical construction of the contract by the conduct of the parties themselves (*a*). It will be remembered that a rule which does not yield to sufficient evidence of contrary intention is not a rule of construction at all, but a rule of law (*b*). Again, many rules of construction are in truth more auxiliary than explanatory; their purpose is to supply the guidance required for dealing with events for which the parties have omitted to provide. In the language of Willes J. "disputes arise not as to the terms of the contract, but as to their application to unforeseen questions which arise inci-

(*u*) See per Lord Mansfield, 3 Burr. 1635, and *Doe d. Leach v. Micklem* (1805) 6 East, 486; Lord St. Leonards, *Wilson v. Wilson* (1854) 5 H. L. C. 40, 66, 23 L. J. Ch. 697, Sugd. V. & P. 171.

(*x*) See Shepp. Touchst. 55, 87, 369.

(*y*) *Cropton v. Davies* (1869) L. R. 4 C. P. 159, 38 L. J. C. P. 159; *Savage v. Tyers* (1872) L. R. 7 Ch. 356; *Daniel's Settlement* (1875) 1 Ch. Div. 375, 45 L. J. Ch. 105; *In re Bird's Trusts* (1876) 3 Ch. D. 214; *Greenwood v. Greenwood* (1877) 5 Ch. Div. 954, 47 L. J. Ch. 298; *Redfern v. Bryning* (1877) 6 Ch. D. 133; as to deciding on conflict

in the terms of a lease by reference to the counterpart, *Burchell v. Clark* (1876) 2 C. P. Div. 88, 46 L. J. C. P. 115. Sometimes it is not easy to decide whether the doctrine of *falsa demonstratio* suffices, or recourse must be had to the equitable jurisdiction to rectify an instrument on the ground of common mistake (Ch. IX. pt. iii. below): see *Cowen v. Truefitt, Ltd.* [1899] 2 Ch. 309, 68 L. J. Ch. 563, C. A.

(*z*) Cockburn C.J. 2 C. P. Div. at p. 93.

(*a*) See *D. C. v. Gallaher* (1888) 124 U. S. 505.

(*b*) F. V. Hawkins on the Construction of Wills, Preface.

dentally or accidentally in the course of performance, and which the contract does not answer in terms, yet which are within the sphere of the relation established thereby, and cannot be decided as between strangers" (c). The parties may really have taken no thought, and therefore had no intention at all with respect to those events, and yet something must be done. In such cases any rule not inconsistent with justice is better than uncertainty, and it matters little whether the reasons originally assigned for an established rule be convincing or not. Among rules or maxims of construction some are much weaker than others, and are entitled, as it were, only to a casting vote. Such is that which says that words are to be taken, in case of doubt, against the person using them; a maxim to which Sir G. Jessel denied even a subsidiary value (d), but which is in substance classical (e) and seems reasonable, and on the whole stands approved on condition of being used to turn the scale where there is real doubt, not to force a less natural meaning on words which have a more natural one (f).

There are artificial rules of construction in particular cases which stand apart from the ordinary principles; they are derived chiefly, but not wholly, from the jurisdiction of the Court of Chancery, and in their origin did not profess to be consistent with the expressed intention of the parties. To some extent they went upon a presumed real intention, but the presumption was at least as much of what the Court thought the parties ought to have intended as of what it thought they did intend (g). They were in truth rules of positive restriction, imposed by a

Artificial
rules
originally
para-
mount to
intention.

(c) *Lloyd v. Guibert* (1865) (Ex. Ch.) L. R. 1 Q. B. 115, 120, 35 L. J. Q. B. 74.

(d) *Taylor v. Corporation of St. Helens* (1877) 6 Ch. Div. 264, 270.

(e) Papinian in D. 2, 14, de pactis, 39. Veteribus placet pactionem obscuram vel ambiguum venditori, et qui locavit, nocere, in quorum

fruit potestate legem apertius conscribere.

(f) Elphinstone, Norton and Clark, *op. cit.* 93. Lord Selborne in *Neill v. Duke of Devonshire* (1882) 8 App. Ca. at p. 149, states it in a guarded form.

(g) Cp. Lindley L.J. 21 Ch. Div. at p. 274.

policy which was then in the hands of the judges, but is now held to be in the exclusive competence of the Legislature, and for the purpose of making the substance of the transaction conform to the requirements of fair dealing, as understood by the Court. Our Courts have long ceased to dictate to parties of full age and with the means of independent judgment on what terms they shall contract, but certain forms and terms have had an artificial meaning firmly impressed on them. The modern justification of such rules is that they are well known, and parties using the accustomed forms do in fact know and expect that their words will be construed in that sense which, by the standing practice of the Courts, has become a received and settled technical sense.

“If cases have laid down a rule that in certain events words are to have a particular meaning, and that has become a settled rule, it may be assumed that persons in framing their agreements have had regard to settled law and may have purposely used words which, though on the face of them they may have a different meaning, they know, by reason of the decided cases, must bear a particular or special meaning” (*h*).

Parties
are now
presumed
to adopt
the artifi-
cial sense.

Policies of marine insurance are to this day made in a form which on the face of it is clumsy, imperfect, and obscure. But the effect of every clause and almost every word has been settled by a series of decisions, and the common form really implies a whole body of judicial rules, “which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognized by the Courts without further proof. Since those decisions, and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same

(*h*) Jessel M.R. *Wallis v. Smith* (1882) 21 Ch. Div. 243, 254, 52 L. J. Ch. 145.

form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract" (i).

The rules applied to restrain the effect of releases in general terms, of stipulations as to time, and of penal clauses, had a different origin, but have been brought round to rest on similar reasons. They are now admitted to be rules of construction which the parties can supersede, if so minded, by the adequate expression of a different intention. Still, they preserve traces of their history, and so lead up to the methods by which equity jurisdiction has dealt, and still deals, with cases of real mistake in expressing an agreement; and in that connexion we shall find it useful to return to them.

2. *Order and Mutuality of Performance.*

When a contract consists in mutual promises which on one or both sides are not to be completely performed at one time, and a party who has not performed the whole of his own obligation complains of a failure on the other side, questions arise which may be of great difficulty. How far is the plaintiff bound to show performance of the contract on his own part, or readiness and willingness to perform? Or, to look at it from the other side, how far will a failure of one party to fulfil some part of his duties under the contract have the effect of discharging the other party from further performance or the offer thereof on his part? Such cases have been of increasing frequency and importance in recent times, especially with regard to contracts for delivery and payment by instalments. To a certain extent the difficulty is one of interpretation, for the modern decisions at any rate endeavour to find a solution

Order of performance in executory contracts.

(i) *Cur. per Brett L.J. Lohre v. Aitchison* (1878) 3 Q. B. Div. 558, 562.

in accordance with the true intent of the parties, although the difficulty is much increased by the general want of any specific evidence of that intent. Most contracts are originally made in good faith, and the parties do not necessarily, perhaps they do not usually, expect that all or any of the promises contained in the contract will be broken, or contemplate in any distinct way what will be the consequences of a breach.

The modern authorities look to intention of contract as a whole.

From Lord Mansfield's time to the present attempts have been made to lay down rules for determining, in the absence of express provisions or other clear indication of intent (*k*), the relation of the one party's obligation to the other as regards the order of performance of mutual promises and the extent to which either is bound to accept performance of part, notwithstanding failure to perform other part. In the earlier decisions the Courts inclined to treat the several terms of a contract, unless expressed to be dependent on the other party's performance (*l*), as separate and independent promises, paying little regard to the effect which default in some or one of them might produce in defeating the purpose of the contract as a whole. At this day the tendency is the other way. The Court looks to the purpose and effect of the contract as a whole as a guide to the probable intention of the parties (*m*), and the presumption, if any there be, is that breach or default in any material term of a contract between men of business amounts to default in the whole.

Common terms.

Certain terms which constantly recur in the authorities must be well understood and distinguished.

Promises or covenants are said to be *independent* when, although they be mutual, breach of any of them gives the other party a right of action without showing performance on his own part (*n*).

(*k*) Cp. Leake, 3rd ed. 566, and the chapter on "The Promise" generally.

(*l*) 15 H. VII. 10, pl. 17.

(*m*) *Bradford v. Williams* (1872) L. R. 7 Ex. 259, 41 L. J. Ex. 259, see judgment of Martin B.

(*n*) Lord Mansfield in *Kingston*

They are said to be *dependent* where "the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant."

Where one party cannot sue for breach of the other's promise without showing on his own part performance of some promise made by himself, or at least readiness and willingness to perform it, there, if the performance on his part was due before the other party's, it is said to be a *condition precedent* to his right of action (o).

If the fulfilment of mutual promises is due at the same time, and so that the party suing must be at least ready and willing to perform his part, it may be said that these are *concurrent conditions*. "Neither is a condition precedent," but "the performance of each is conditional upon the other's being performed at the same time" (p).

A contract which can be fulfilled only as a whole, so that failure in any part is failure in the whole, is said to be entire. A contract of which the performance can be separated, so that failure in one part affects the parties' rights as to that part only, is said to be divisible.

It must always be understood that questions of this kind are possible only where a contract consists of mutual promises. For if performance itself is the consideration for a promise, there is no contract at all without performance. But when there is a contract made by mutual promises, we may have to enquire whether, in addition to each promise or set of promises being the consideration for the other, the performance thereof on the one side is not a condition, precedent or concurrent, of the right to claim performance on the other. There is no logical reason why it should not be so, or why express words should be required to manifest an intention that it should.

v. *Preston* (1773) cited in *Jones v. Backley*, Doug. 689; *Finch*, Sel. Ca. 735.

(o) See *Bankart v. Bowers* (1866) L. R. 1 C. P. 484; *Norrington v. Wright* (1885) 115 U. S. 189.
(p) *Langdell*, Summary, § 132.

Each party's promise is the consideration for the promise of the other, not for the performance which is due by reason of the promise. What are the terms and conditions of the duty created by the promise is another matter. In an executory contract of sale the promise to deliver is the consideration for the promise to pay; but this need not be a promise to pay before or without delivery. However, the earlier line of decision was biassed by rules laid down in cases on promises by deed before the law of executory simple contracts was developed; and for a long time it was supposed that promises which were the consideration for each other must, as a matter of law, be independent (*q*). Late in the eighteenth century this view was abandoned, and it was held that "whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done," so that "if one party covenant to do one thing in consideration (*r*) of the other party's doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance" (*s*).

Order of
perform-
ance.

Generally "the order in which the several things are to be done" is the test most readily applicable (*t*); accordingly it is said that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money (or other act) is to be performed, an action may be brought for the money (or for not doing such other act) *before* performance" (*u*). But

(*q*) See Langdell, § 140, and the whole title of "Dependent and Independent Covenants and Promises," and notes to *Pordage v. Cole*, 1 Wms. Saund. 549.

(*r*) The word "consideration" is here used in an elliptical manner, and not quite accurately. The promises are the consideration, and the only consideration, for each other. But if the substance of the promises is that performance shall

be exchanged for performance, neither party can demand performance on any other terms.

(*s*) *Morton v. Lamb* (1797) 7 T. R. 125, 4 R. R. 395, per Lord Kenyon C.J. and Grose J.

(*t*) Cp. Clark Hare on Contracts, 589.

(*u*) Wms. Saund. 551; Jervis C.J. in *Roberts v. Brett* (1856) 18 C. B. 373, 25 L. J. C. P. 280, 286.

this is really no more than a rule of interpretation; it "only professes to give the result of the intention of the parties" (x); the reason given for it is that "it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent." Therefore the rule, like all rules of its kind, must yield to evidence of a different intention, and "where it is clear that the intention was to rely on the performance of the condition and not on the remedy, the performance is a condition precedent" (x).

Another test often applied is whether the term of the contract in which default has been made "goes to the whole of the consideration," or only to part; in other words, whether the importance of that term with regard to the contract as a whole is or is not such that performance of the residue would be, not a defective performance of that which was contracted for, but a total failure to perform it. Can it be said that the promisee gets what he bargained for, with some shortcoming for which damages will compensate him? or is the point of failure so vital that his expectation is in substance defeated? The necessity of dealing with this question as a whole was perhaps obscured to some extent by the requirements of formal pleading (y), but it has been strongly asserted in all the recent authorities.

Total or
partial
default.

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and *prima facie* a condition precedent, is not really vital, and may be compensated for in damages,

(x) Jervis C.J. *loc. cit.*

(y) It cannot be said that it was overlooked: see *Withers v. Reynolds*

(1831) 2 B. & Ad. 882, 36 R. R. 782, *Franklin v. Miller* (1836) 4 A. & E. 599, both long before the Common Law Procedure Act.

and if they sufficiently expressed such an intention, it will not be a condition precedent.

“And in the absence of such an express declaration, we think that we are to look to the whole contract, and applying the rule stated by Parke B. to be acknowledged (z), see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent” (a).

The agreement sued on in the case where the principle was thus declared was an opera singer's engagement. The singer, who was plaintiff in the cause, was to sing in concerts as well as operas, and during a period of a year, beginning three months before the active duties of the engagement, he was not to sing out of the theatre in the United Kingdom (in the opera season, or within fifty miles of London) without the defendant's permission. He was also to be in London for rehearsals six days before the commencement of the engagement. This last term was not fulfilled, but it was held that, having regard to the whole scope of the agreement, it did not go to the root of the matter so as to justify the defendant in determining the engagement and refusing to employ the plaintiff. Matter of excuse was alleged by the plaintiff for his failure to arrive at the time stipulated, but nothing turned upon this.

If, however, there be any presumption either way in the modern view of such cases, it is that, in mercantile contracts at any rate, all express terms are material. “Merchants

Agreements are now presumed entire

(z) In *Graves v. Legg* (1854) 9 Ex. at p. 716, 23 L. J. Ex. 228.

(a) *Blackburn J. Bettini v. Gye* (1876) 1 Q. B. D. 183, 187, 188; *Finch Sel. Ca.* 742, 745.

are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (b). In a case not mercantile, where the contract before the Court was held on its terms to be divisible, the late Lord Justice Mellish said:—

rather
than
divisible.

"I quite agree that as a general rule all agreements must be considered as entire. Generally speaking, the consideration for the performance of the whole and each part of an agreement by one party to it is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement. As a general rule, therefore, an agreement is entire. I can also conceive that a court of equity might treat an agreement as entire even in cases where a court of law would say that the performance of one part is not a condition precedent to the performance of the other part, because the Court might see that those rules as to conditions precedent, which to a certain extent are technical, might not meet the real justice of the case. But, on the other hand, I do not find it laid down anywhere that it is impossible for the parties so to frame an agreement that there may be a specific performance of part" (c).

The question to what extent, if at all, a party is bound to accept performance of less than all that was promised him is to be distinguished from the question, not to be pursued here, of the duty incurred by one who does accept and in fact has some benefit from a partial performance. It may be the intention of a contract that nothing less than complete performance on one side shall found any claim at all to payment on the other. In such cases effect is given to the intention, and an imperfect performance,

Entire
considera-
tion and
quantum
meruit.

(b) Lord Cairns in *Bowes v. Shand* (1877) 2 App. Ca. 455, 463.

(c) *Wilkinson v. Clements* (1872) L. R. 8 Ch. 96, 110.

from whatever cause remaining imperfect, affords no ground of action. The express terms are not fulfilled and a term or new contract to pay what the benefit received is reasonably worth cannot be introduced where the express terms exclude it (*d*). But such a contract, it seems, cannot be executory; the complete performance itself is the only consideration for the promise to pay. It is like the offer of a reward by advertisement to the first person who procures certain information. A person who brings the information, but is not the first to bring it, evidently has no claim on the advertiser, whatever amount of trouble and expense he may have incurred, and although the delay may be due to inevitable accident (*e*).

3. *Default in First or other Instalments of Discontinuous Performance.*

Questions
on sales for
delivery
by instal-
ments.

Peculiarly troublesome questions have arisen upon contracts for the sale of goods to be delivered and paid for by instalments. It is not yet settled whether failure to deliver the first or any subsequent instalments is or is not presumed, in the absence of any special indication of the parties' intention, to go to the whole of the consideration and entitle the buyer to refuse acceptance of any further deliveries. It seems to be admitted that failure on the buyer's part to pay according to the terms of the contract for the first or any particular instalment as delivered is not of itself a breach of the entire contract (*f*); but such default or refusal may by the reason assigned for it, or because of other particular circum-

(*d*) Where performance has been defective by the plaintiff's own fault, the burden is on him to show a fresh contract to pay for what he has actually done: see *Sumpter v. Hedges* [1898] 1 Q. B. 673, 67 L. J. Q. B. 515, C.A.

(*e*) See *Cutter v. Powell* (1795) 6

T. R. 320, 3 R. R. 185, and notes thereto in 2 Sm. L. C.

(*f*) *Mersey Steel and Iron Company v. Naylor* (1884) 9 App. Ca. 434, 439, 444, 53 L. J. Q. B. 497; *Freeth v. Burr* (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91.

stances, manifest an intention to repudiate the contract as a whole, in which case the seller may justly refuse in his turn to go on with the contract (*g*).

In *Hoare v. Rennie* (*h*), a case decided on pleadings, the contract appeared to have been to sell about 667 tons of iron of a specified kind, to be shipped in June, July, August, and September, in about equal portions each month. The action was by the sellers for non-acceptance, and for wrongful repudiation of the contract. The buyers pleaded, in effect, that a June shipment of 21 tons only was offered by the plaintiffs, who were never ready and willing to deliver a proper June shipment according to the contract, and that the defendants thereupon refused to receive the portion shipped and tendered, and gave notice that they would not receive the residue. The plaintiffs demurred, and the pleas were upheld, as showing that the plaintiffs had not been ready and willing to perform the substance of their contract within the appointed time. In the judgments almost exclusive attention is paid to the question whether the defendants were bound to accept the first shipment; in only one of them (*i*) is it stated in general terms that the defendants were at liberty to rescind the contract, but the decision evidently involves this (*k*).

*Hoare v.
Rennie.*

In *Simpson v. Crippin* (*l*) the contract was to supply about 6,000 to 8,000 tons of coal, to be delivered into the buyers' waggons, in "equal monthly quantities during the period of twelve months from the 1st of July next."

*Simpson v.
Crippin.*

(*g*) *Withers v. Reynolds* (1831) 2 B. & Ad. 882, 36 R. R. 782; *Freeth v. Burr* (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91; and see per Lord Blackburn, *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Ca. at p. 442.

(*h*) (1859) 5 H. & N. 19, 29 L. J. Ex. 73.

(*i*) *Channell B.* 5 H. & N. at p. 29.

(*k*) Much of the language of the judgments would certainly have been more appropriate if the action had been for non-acceptance of the first shipment only. Cf. L. Q. R. ii. 281; and per Bowen L.J. in *Mersey Steel and Iron Co. v. Naylor* (1884) 9 Q. B. Div. at p. 671; and per Jessel M.R. *ib.* at p. 658.

(*l*) (1872) L. R. 8 Q. B. 14.

During the first month of the contract the buyers, though pressed by the sellers to send waggons, took only 158 tons. The sellers thereupon gave notice to the buyers that they cancelled the contract. It was held that the breach did not justify rescission, and great doubt was thrown upon *Hoare v. Rennie*.

*Honck v.
Muller.*

In *Honck v. Muller* (m) the contract was to deliver 2,000 tons of iron, "November, 1879, or equally over November, December, and January next, at 6*d.* per ton extra." The buyer failed to take any of the iron in November, but near the end of the month offered to "take delivery of all in December and January" (n). On December 1 the seller cancelled the contract, and was held by the majority of the Court of Appeal to have been entitled to do so, even on the supposition that in the circumstances the buyer could and did elect to take delivery in three portions in the three months named. "I think," said Bramwell L.J. "where no part of a contract has been performed, and one party to it refuses to perform the entirety to be performed by him, the other party has a right to refuse any part to be performed by him. I think if a man sells 2,000 tons of iron, he ought not to be bound to deliver 1,333 $\frac{1}{3}$ only, if it can be avoided" (o).

*Freeth v.
Burr.*

Meanwhile it had been held in *Freeth v. Burr* (p) that refusal by a buyer to pay for a much delayed delivery of the first instalment (under a mistaken claim to set off loss arising from any future default in delivering the residue) did not entitle the seller to rescind the contract. It was suggested that, "in cases of this sort, where the question

(m) (1881) 7 Q. B. Div. 92, 50 L. J. Q. B. 529.

(n) See 7 Q. B. Div. at p. 94 (not one-third in December and one-third in January, as stated in the head-note).

(o) 7 Q. B. Div. 98. Baggallay L.J. to the same effect approving *Hoare v. Rennie*, and disapproving *Simpson v. Crippin*, which Bramwell

L.J. endeavoured to distinguish on the ground that the contract had in that case been partly performed. Brett L.J. dissented, thinking *Simpson v. Crippin* right, and *Hoare v. Rennie* wrong; cp. his dissenting judgment in *Reuter v. Sala* (1879) 4 C. P. Div. 239, 48 L. J. C. P. 492.

(p) (1874) L. R. 9 C. P. 208, 43 L. J. C. P. 91.

is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract," or, in other words, "evince an intention no longer to be bound by the contract" (q).

The later case of the *Mersey Steel and Iron Company* (r), where there was only a postponement of payment, in peculiar circumstances, under erroneous advice, confirms *Freeth v. Burr*, so far as it goes (s). As a positive test, the rule of *Freeth v. Burr* is doubtless correct; that is, a party who, by declaration or conduct, "evinces an intention no longer to be bound by the contract," entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? Must it not depend on the nature of the contract and the order and apparent connection of its terms? All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach. In other words, non-payment will not as a rule justify refusal to perform on the other side, unless there be something more in the circumstances by which it is shown to amount to repudiation, as in *Withers v. Reynolds* (t), where there was a deliberate and wilful refusal to pay for the successive deliveries according to the terms of the contract.

(q) Lord Coleridge C.J. at p. 213; Keating and Denman JJ. concurred in affirming this principle.

(r) (1884) 9 App. Ca. 434, 53 L. J. Q. B. 497. The House of Lords seems to have thought criticism of

Hoare v. Rennie not relevant.

(s) See per Lord Selborne, 9 App. Ca. at p. 438, and per Lord Blackburn at pp. 442-3.

(t) (1831) 2 B. & Ad. 882, 36 R. R. 782, Finch Sel. Ca. 749.

Mersey Steel and Iron Company v. Naylor.

Norrington
v.
Wright.

In 1885 the Supreme Court of the United States (*u*) had to deal with a case very like *Hoare v. Rennie*. The contract was for 5,000 tons of iron rails to be shipped from Europe "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." The action was for non-acceptance. A few passages from the judgment of the Court will best show the view taken by them.

"In the contracts of merchants, time is of the essence (*x*). The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons . . .

"The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to payment for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments or deliveries of so many distinct quantities of iron . . .

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

"The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and

(*u*) *Norrington v. Wright* (1885) 115 U. S. 189.

(*x*) This had already been laid down in England: *Reuter v. Sala*

(1879) 4 C. P. Div. 239, see per Cotton L.J. at p. 249, 48 L. J. C. P. 492. Cp. *Brown v. Guarantee Trust Co.* 128 U. S. 403, 414.

885 tons in March. His failure to fulfil the contract on his part in respect of these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission."

The Court went on to review the English cases, which did not in their opinion establish any rule inconsistent with the decision arrived at in the case at bar. All will agree with them that "a diversity in the law as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated" (*y*). And although the decision is not authoritative in this country, we may expect that an opinion of such weight, and so carefully and critically expressed, will receive full consideration whenever the point is again before the Court of Appeal or the House of Lords. It is a notable addition of force to the modern tendency to eschew stiff and artificial canons of construction, and to hold parties who have made deliberate promises to the full and plain meaning of their terms.

The Sale of Goods Act, 1893, has now declared as follows:—

Sale of
Goods
Act.

Sect. 10.—(1.) Unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

Sect. 31.—(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, it is a ques-

(*y*) 115 U. S. at p. 206.

tion in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

The apparent intention and effect of these enactments is to put on record the existing state of the authorities without deciding any question that still remains fairly open. What is said as to repudiation is obviously derived from *Freeth v. Burr* (p. 268 above), but does not seem to amount to a legislative approval of everything that was said in that case: for the Act does not say "shows an intention to repudiate," but "is a repudiation." Indeed, the opinion that the real question is not of intention but of result seems to be rather strengthened than otherwise by this language.

CHAPTER VII.

UNLAWFUL AGREEMENTS.

WE have already seen that an agreement is not in any case enforceable by law without satisfying sundry conditions: as, being made between capable parties, being sufficiently certain, and the like. If it does satisfy these conditions, it is in general a contract which the law commands the parties to perform. But there are many things which the law positively commands people not to do. The reasons for issuing such commands, the weight of the sanctions by which they are enforced, and the degree of their apparent necessity or expediency, are exceedingly various, but for the present purpose unimportant. A murder, the obstruction of a highway, and the sale of a loaf otherwise than by weight, are all on the same footing in so far as they are all forbidden acts. If the subject-matter of an agreement be such that the performance of it would either consist in doing a forbidden act or be so connected therewith as to be in substance part of the same transaction, the law cannot command the parties to perform that agreement. It will not always command them not to perform it, for there are many cases where the performance of the agreement is not in itself an offence, though the complete execution of the object of the agreement is: but at all events it will give no sort of assistance to such a transaction. Agreements of this kind are void as being *illegal* in the strict sense.

Subject-matter or performance a thing positively forbidden, or part of a transaction which as a whole is forbidden (*illegal*).

Not positively forbidden but *immoral*.

Again, there are certain things which the law (*a*) does not forbid in the sense of attaching penalties to them, but which are violations of established rules of decency, morals, or good manners, and of whose mischievous nature in this respect the law so far takes notice that it will not recognize them as the ground of any legal rights. "A thing may be unlawful in the sense that the law will not aid it, and yet that the law will not immediately punish it" (*b*). Agreements whose subject-matter falls within this description are void as being *immoral*.

Not positively forbidden, but *against public policy*.

Further, there are many transactions which cannot fairly be brought within either of the foregoing classes, and yet cannot conveniently be admitted as the subject-matter of valid contracts, or can be so admitted only under unusual restrictions. It is doubtful whether these can be completely reduced to any general description, and how far judicial discretion may go in novel cases. They seem in the main, however, to fall into the following categories:

Matters governed by reasons outside the regular scope of municipal law, and touching the relations of the commonwealth to foreign states:

Matters touching the good government of the commonwealth and the administration of justice:

Matters affecting particular legal duties of individuals whose performance is of public importance:

Things lawful in themselves, but such that individual citizens could not without general inconvenience be allowed to set bounds to their freedom of action with regard to those things in the same manner or to the same extent as they may with regard to other things (*c*).

(*a*) *i.e.* the common law. But *qu.* whether the common law could take notice of anything as immoral which would not constitute an offence against either common or ecclesiastical law.

(*b*) *Bramwell B. Cowan v. Mil-*

bourn (1867) L. R. 2 Ex. at p. 236, 36 L. J. Ex. 124.

(*c*) We have already seen that the specific operation of contract is none other than to set bounds to the party's freedom of action as regards the subject-matter of the contract.

Agreements falling within this third description are void as being *against public policy*. Summary.

We have then in the main three sorts of agreements which are unlawful and void, according as the matter or purpose of them is—

- A. Contrary to positive law. (*Illegal.*)
- B. Contrary to positive morality recognized as such by law. (*Immoral.*)
- C. Contrary to the common weal as tending
 - (a) To the prejudice of the State in external relations.
 - (b) To the prejudice of the State in internal relations.
 - (c) To improper or excessive interference with the lawful actions of individual citizens. (*Against public policy.*)

The distinction here made is in the reasons which determine the law to hold the agreement void, not in the nature or operation of the law itself: the nullity of the agreement itself is in every case a matter of positive law. Bearing this in mind, it is a harmless abbreviation to speak of the agreement itself as contrary to positive law, to morality, or to public policy, as the case may be. Caution as to use of terms.

The arrangement here given is believed to be on the whole the most convenient, and to represent distinctions which are in fact recognized in the decisions that constitute the law on the subject. But like all classifications it is only approximate: and where the field of judicial discretion is so wide as it is here (for nowhere is it wider) we must expect to find many cases which may nearly or quite as well be assigned to one place as to another. The authorities and dicta are too numerous to admit of any detailed review. But the general rules are (with some few exceptions) sufficiently well settled, so far as the nature of the case admits of general rules existing. Any given decision, on the other hand, is likely to be rather suggestive than conclusive when applied to a new set of facts. Some The arrangement only approximate.

positive rules for the construction of statutes have been worked out by a regular series of decisions. But with this exception we find that the case-law on most of the branches of the subject presents itself as a clustered group of analogies rather than a linear chain of authority. We have then to select from these groups a certain number of the more striking and as it were central instances. The statement of the general rules which apply to all classes of unlawful agreements indifferently will be reserved, so far as practicable, until we have gone through the several classes in the order above given.

Classes of unlawful agreements.

A. contrary to positive law.

1. Agreement to commit offence, void.

Sometimes doubtful if performance of agreement would be offence.

Mayor of Norwich v. Norfolk Ry. Co.

A. *Agreements contrary to positive law.*

1. The simplest case is an agreement to commit a crime or indictable offence :

“If one bind himself to kill a man, burn a house, maintain a suit, or the like, it is void” (*d*).

With one or two exceptions on which it is needless to dwell, obviously criminal agreements do not occur in our own time and in civilized countries, and at all events no attempt is made to enforce them. In the eighteenth century a bill was filed on the Equity side of the Exchequer by a highwayman against his fellow for a partnership account. The bill was reported to the Court both scandalous and impertinent, and the plaintiff's solicitors were fined and his counsel ordered to pay costs (*e*). The question may arise, however, whether a particular thing agreed to be done is or is not an offence, or whether a particular agreement is or is not on the true construction of it an agreement to commit an offence. In the singular case of *Mayor of Norwich v. Norfolk Ry. Co.* (*f*), the defendant company, being authorized to make a bridge over a navigable river at one particular place, had found difficulties in executing the

(*d*) Shepp. Touchst. 370.

(*e*) Lindley, on Partnership, 101.
See L. Q. R. ix. 197, for an account of the case (*Everet v. Williams*) veri-

fied from the originals in the Record Office.

(*f*) (1855) 4 E. & B. 397, 24 L. J. Q. B. 105.

statutory plan, and had begun to build the bridge at another place. The plaintiff corporation took steps to indict the company for a nuisance. The matter was compromised by an arrangement that the company should—not discontinue their works, but—complete them in a particular manner, intended to make sure that no serious obstruction to the navigation should ensue: and an agreement was made by deed, in which the company covenanted to pay the corporation £1000 if the works should not be completed within twelve months, whether an Act of Parliament should within that time be obtained to authorize them or not. The corporation sued on this covenant, and the company set up the defence that the works were a public nuisance, and therefore the covenant to complete them was illegal. The Court of Queen's Bench was divided on the construction and effect of the deed. Erle J. thought it need not mean that the defendants were to go on with the works if they did not obtain the Act. "Where a contract is capable of two constructions, the one making it valid and the other void, it is clear law the first ought to be adopted." Here it should be taken that the works contracted for were works to be rendered lawful by Act of Parliament. Coleridge J. to the same effect: he thought the real object was to secure by a penalty the speedy reduction of a nuisance to a nominal amount, which was quite lawful, the corporation not being bound to prosecute for a nominal nuisance. Lord Campbell C.J. and Wightman J. held the agreement bad, as being in fact an agreement to continue an existing unlawful state of things. The performance of it (without a new Act of Parliament) would have been an indictable offence, and the Court could not presume that an Act would have been obtained. Lord Campbell said:—"In principle I do not see how the present case is to be distinguished from an action by A. against B. to recover £1000, B. having covenanted with A. that within twelve calendar months he would murder C., and that on failing to do so he would forfeit and pay to A. £1000 as liqui-

dated damages, the declaration alleging that although B. did not murder C. within the twelve calendar months he had not paid A. the £1000 " (g).

It seems impossible to draw any conclusion in point of law from such a division of opinion (h). But the case gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful.

When the
ulterior
object is
an offence.

Moreover a contract may be illegal because an offence is contemplated as its ulterior result, or because it invites to the commission of crime. For example, an agreement to pay money to A.'s executors if A. commits suicide would be void (i); and although there is nothing unlawful in printing, no right of action can arise for work done in printing a criminal libel (k). But this depends on the more general considerations which we reserve for the present.

2. Agree-
ment for
civil
wrong to
third per-
sons is
void.

2. Again an agreement will generally be illegal, though the matter of it may not be an indictable offence, and though the formation of it may not amount to the offence of conspiracy, if it contemplates (l) any civil injury to third persons. Thus an agreement to divide the profits of a fraudulent scheme, or to carry out some object in itself not unlawful by means of an apparent trespass, breach of

(g) 4 E. & B. 441.

(h) Not only was the Court equally divided, but a perusal of the judgments at large will show that no two members of it really looked at the case in the same way. The reporters (4 E. & B. 397) add not without reason to the head-note: *Et quaere inde*.

(i) Per Bramwell L.J. 5 C. P. D. at p. 307.

(k) *Poplett v. Stockdale* (1825)

R. & M. 337, 2 C. & P. 198, 31 R. R. 662.

(l) If A. contracts with B. to do something which in fact, but not to B.'s knowledge, would involve a breach of contract or trust, A. cannot lawfully perform his promise, but yet may well be liable in damages for the breach. *Millward v. Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2. See further at end of this chapter.

contract, or breach of trust is unlawful and void (*m*). A. applies to his friend B. to advance him the price of certain goods which he wants to buy of C. B. treats with C. for the sale, and pays a sum agreed upon between them as the price. It is secretly agreed between A. and C. that A. shall pay a further sum: this last agreement is void as a fraud upon B., whose intention was to relieve A. from paying any part of the price (*n*). Again, A. and B. are interested in common with other persons in a transaction the nature of which requires good faith on all hands, and a secret agreement is made between A. and B. to the prejudice of those others' interest. Such are in fact the cases of agreements "in fraud of creditors"; that is, where there is an arrangement between a debtor and the general body of the creditors, but in order to procure the consent of some particular creditor, or for some other reason, the debtor or any person on his behalf, or with his knowledge (*o*), secretly promises that creditor some advantage over the rest. All such secret agreements are void: securities given in pursuance of them may be set aside, and money paid under them ordered to be repaid (*p*).

Agreement in fraud of creditors is void.

(*m*) An agreement to commit a civil injury is a conspiracy in many, but it seems impossible to say precisely in what, cases. See the title of Conspiracy in Roscoe's Digest, (ed. Horace Smith, 1884). An agreement to commit a trespass likely to lead to a breach of the peace, *Reg. v. Rowlands* (1851) 17 Q. B. 671, 686, 21 L. J. M. C. 81—or to commit a civil wrong by fraud and false pretences, *Reg. v. Warburton* (1870) L. R. 1 C. C. R. 274, 40 L. J. M. C. 22, cp. *Reg. v. Aspinall* (1876) 2 Q. B. Div. at p. 59, 46 L. J. M. C. 145—is a conspiracy. An agreement to commit a simple breach of contract is not a conspiracy. See on the whole subject, *Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. 295; *Quinn v. Leatham*, [1901] A. C. 395, 70 L. J. P. C. 76. Before the C. L. P.

Act a court of common law could not take notice of an agreement being in breach of trust so as to hold it illegal: *Warwick v. Richardson* (1842) 10 M. & W. 284, and agreements to indemnify trustees against formal breaches of trust are in practice constantly assumed to be valid in equity as well as law.

(*n*) *Jackson v. Duchaire* (1790) 3 T. R. 551.

(*o*) Equality among the creditors is of the essence of the transaction. Any agreement to give a preference, made with the debtor's privity, strikes at the root of the deed. It is immaterial whether the arrangement is under a statute or not, and whether the preferential payment is to come out of the debtor's funds or not. *Ex parte Milner* (1885) 15 Q. B. Div. 605, 54 L. J. Q. B. 425.

(*p*) *McKewan v. Sanderson* (1873)

And other
creditors
not bound
by the
composi-
tion.

Moreover, the other creditors who know nothing of the fraud and enter into the arrangement on the assumption "that they are contracting on terms of equality as to each and all" are under such circumstances not bound by any release they give (*q*). And it will not do to say that the underhand bargain was in fact for the benefit of the creditors generally, as where the preferred creditor becomes surety for the payment of the composition, and the real consideration for this is the debtor's promise to pay his own debt in full; for the creditors ought to have the means of exercising their own judgment (*r*). But where one creditor is induced to become surety for an instalment of the composition by an agreement of the principal debtor to indemnify him, and a pledge of part of the assets for that purpose, this is valid: for a compounding debtor is master of the assets and may apply them as he will (*s*).

The principle of these rules was thus explained by Erle J. in *Mallalieu v. Hodgson* (*t*):—

"Each creditor consents to lose part of his debt in consideration that the others do the same, and each creditor may be considered to stipulate with the others for a release from them to the debtor in consideration of the release by him. Where any creditor, in fraud of the agreement to accept the composition, stipulates for a preference to himself, his stipulation is altogether void—not only can he take no advantage from it, but he is also to lose the benefit of the composition (*u*). The requirement of good faith among the creditors and the preventing of gain by agreements for preference have been uniformly maintained by a series of cases from *Leicester v. Rose* (*x*) to *Howden v. Haigh* (*u*) and *Bradshaw v. Bradshaw*" (*y*).

From the last cited case (*y*) it seems probable, though

L. R. 15 Eq. at p. 234, per Malins V.-C. 42 L. J. Ch. 296.

(*q*) *Daughlish v. Tennent* (1866) L. R. 2 Q. B. 49, 54, 36 L. J. Q. B. 10.

(*r*) *Wood v. Barker* (1865) L. R. 1 Eq. 139.

(*s*) *Ex parte Burrell* (1876) 1 Ch. Div. 537, 45 L. J. Bk. 68.

(*t*) (1851) 16 Q. B. 689, 20 L. J. Q. B. 339, 347. See further *Ex parte Oliver* (1849-51) 4 De G. & Sm. 354.

(*u*) (1840) 11 A. & E. 1033; 52 R. R. 579.

(*x*) (1803) 4 East, 372: showing that the advantage given to the preferred creditor need not be in money.

(*y*) (1841) 9 M. & W. 29.

it is not decided, that when a creditor is induced to join in a composition by having an additional payment from a stranger without the knowledge of either the other creditors or the debtor, the debtor on discovering this may refuse to pay him more than with such extra payment will make up his proper share under the composition, or may even recover back the excess if he has paid it involuntarily, *e.g.* to *bona fide* holders of bills given to the creditor under the composition.

A debtor who has given a fraudulent preference can claim no benefit under the composition even as against the creditor to whom the preference has been given (*z*).

A secret agreement by a creditor to withdraw his opposition to a bankrupt's discharge or to a composition is equally void, and it does not matter whether it is made with the debtor himself or with a stranger (*a*), nor whether the consideration offered to the creditor for such withdrawal is to come out of the debtor's assets or not (*b*); and this even if it is part of the agreement that the creditor shall not prove against the estate at all (*c*). In like manner if a debtor executes an assignment of his estate and effects for the benefit of all his creditors upon a secret agreement with the trustees that part of the assets is to be returned to him, this agreement is void (*d*).

We have here at an early stage of the subject a good instance of the necessarily approximate character of our classification. We have placed these agreements in fraud of creditors here as being in effect agreements to commit civil injuries. But a composition with creditors is in most cases something more than an ordinary civil contract; it is in truth a quasi-judicial proceeding, and as such is to a certain extent assisted by the law (*e*). Public policy,

(*z*) *Higgins v. Pitt* (1849) 4 Ex. 312, 18 L. J. Ex. 488.

(*a*) *Higgins v. Pitt*, last note.

(*b*) *Hall v. Dyson* (1852) 17 Q. B. 785, 21 L. J. Q. B. 224.

(*c*) *McKewan v. Sanderson* (1875) L. R. 20 Eq. 65, 42 L. J. Ch. 296.

(*d*) *Blacklock v. Dobie* (1876) 1 C. P. D. 265, 45 L. J. C. P. 498.

(*e*) Bankruptcy Act, 1883, ss. 18,

Fraud on third parties not to be presumed from mere possibilities.

therefore, as well as private right, requires that such a proceeding should be conducted with good faith and that no transaction which interferes with equal justice being done therein should be allowed to stand. The doctrine of fraud on third parties, as it may be called, is however not to be extended to cases of mere suspicion or conjecture. A possibility that the performance of a contract may injure third persons is no ground for presuming that such was the intention, and on the strength of that presumed intention holding it invalid between the parties themselves.

“Where an instrument between two parties has been entered into for a purpose which may be considered fraudulent as against some third person, it may yet be binding, according to the true construction of its language, as between themselves.”

Nor can a supposed fraudulent intention as to third persons (inferred from the general character and circumstances of a transaction) be allowed to determine what the true construction is (*f*).

3. Certain cases of analogous nature as involving “fraud on third persons.”

3. There are certain cases analogous enough to the foregoing to call for mention here, though not for any full treatment. Their general type is this: There is a contract giving rise to a continuing relation to which certain duties are incident by law; and a special sanction is provided for those duties by holding that transactions inconsistent with them avoid the original contract, or are themselves voidable at the option of the party whose rights are infringed. We have results of this kind from

- (a) Dealings between a principal debtor and creditor to the prejudice of a surety:
- (b) Dealings by an agent in the business of the agency on his own account:
- (c) Voluntary settlements before marriage “in fraud of marital rights.”

19. Since this Act there is a notable increase of private compositions independent of the Act.

(*f*) *Shaw v. Jeffery* (1860) 13 Moo. P. C. 432, 455.

In the first case the improper transaction is as a rule valid in itself, but avoids the contract of suretyship. In the second it is voidable as between the principal and the agent. In the third it is (or was) voidable at the suit of the husband.

(a) "Any variance made without the surety's consent in the terms of the contract between the principal debtor and the creditor discharges the surety as to transactions subsequent to the variance" (g), unless it is evident to the Court "that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety" (h). The surety is not the less discharged "even though the original agreement may notwithstanding such variance be substantially performed" (i). An important application of this rule is that "where there is a bond of suretyship for an officer, and by the act of the parties or by Act of Parliament the nature of the office is so changed that the duties are materially altered, so as to affect the peril of the sureties, the bond is avoided" (k). But when the guaranty is for the performance of several and distinct duties, and there is a change in one of them, or if an addition is made to the duties of the principal debtor by a distinct contract, the surety remains liable as to those which are unaltered (l). The following rules rest on the same ground:

Dealings between principal creditor and debtor to prejudice of surety.

"The surety is discharged by any contract between the creditor and the principal debtor by which the principal debtor is released, or by any act or omission of the creditor

(g) Indian Contract Act, s. 133.

(h) *Holme v. Brunskill* (1877) 3 Q. B. Div. 495 (diss. Brett L.J.), overruling on this point *Sanderson v. Aston* (1873) L. R. 8 Ex. 73, 42 L. J. Ex. 64.

(i) Per Lord Cottenham, *Bonar v. Macdonald* (1850) 3 H. L. C. 226, 238.

(k) *Oswald v. Mayor of Berwick-*

on-Tweed (1856) 5 H. L. C. 856, 25 L. J. Q. B. 383; *Pybus v. Gibb* (1846) 6 E. & B. 902, 911, 26 L. J. Q. B. 41; *Mayor of Cambridge v. Dennis* (1858) E. B. & E. 660, 27 L. J. Q. B. 474.

(l) *Harrison v. Seymour* (1866) L. R. 1 C. P. 518, 35 L. J. C. P. 264; *Skillett v. Fletcher* (1866) L. R. 1 C. P. 217, 224, in Ex. Ch. 2 C. P. 469, 36 L. J. C. P. 206.

the legal consequence of which is the discharge of the principal debtor" (*m*).

"A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract" (*n*), or unless in such contract the creditor reserves his rights against the surety (*o*), in which case the surety's right to be indemnified by the principal debtor continues (*p*). One reported case constitutes an apparent exception to the general rule, but is really none, as there the nominal giving of time had in substance the effect of accelerating the creditor's remedy (*q*). The rule applies as against a creditor of two principal debtors of whom one has become primarily liable as between themselves, whether the creditor assents to the arrangement or not, provided he has notice of it (*r*).

"If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged" (*s*).

(*m*) I. C. A. s. 134. *Kearsley v. Cole* (1846) 16 M. & W. 128, 16 L. J. Ex. 115; *Cragoe v. Jones* (1873) L. R. 8 Ex. 81, 42 L. J. Ex. 68. The discharge extends to any security given by the surety: *Bolton v. Salmon* [1891] 2 Ch. 48, 60 L. J. Ch. 239.

(*n*) I. C. A. s. 135. *Oakeley v. Pasheller* (1836) 4 Cl. & F. 207, 10 Bli. N.S. 548, 42 R. R. 1; *Oriental Financial Corporation v. Overend, Gurney & Co.* (1874) L. R. 7 H. L. 348; *Green v. Wynn* (1869) L. R. 4 Ch. 204, 38 L. J. Ch. 220; *Bateson v. Gosling* (1871) L. R. 7 C. P. 9, 41 L. J. C. P. 53. It must be a binding contract with the principal debtor: *Clarke v. Birley* (1889) 41 Ch. D. 422, 434, 58 L. J. Ch. 616.

(*o*) Whether the surety knows of

it or not: *Webb v. Hewitt* (1857) 3 K. & J. 438, 442; and see per Lord Hatherley, L. R. 7 Ch. 150.

(*p*) *Close v. Close* (1853) 4 D. M. G. 176, 185.

(*q*) *Hulme v. Coles* (1827) 2 Sim. 12, 29 R. R. 52.

(*r*) *Oakeley v. Pasheller* (note (*n*) above) as discussed and explained in *Rouse v. Bradford Bkg. Co.* [1894] 2 Ch. 32, 63 L. J. Ch. 337, C. A.; affirmed [1894] A. C. 586, 63 L. J. Ch. 890.

(*s*) I. C. A. s. 139 (= Story, Eq. Jur. § 325 nearly); *Watson v. Allcock* (1853) 4 D. M. G. 242, *supra*, p. 179; *Burgess v. Eve* (1872) L. R. 13 Eq. 450, 41 L. J. Ch. 515; *Phillips v. Foxall* (1872) L. R. 7 Q. B. 666, 41 L. J. Q. B. 293; *Sanderson v. Aston* (1873) L. R. 8 Ex. 73, 42 L. J. Ex. 64.

"A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or without the consent of the surety parts with such security, the surety is discharged to the extent of the value of the security" (*t*). Not only an absolute parting with the security, but any dealing with it, such that the surety cannot have the benefit of it in the same condition in which it existed in the creditor's hands, will have this effect (*u*). For the same reason, if there be joint sureties, and the debtor releases one, it is a release to all; otherwise if the sureties are several (*x*).

(b) "If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction" (*y*).

Dealings by agent in the matter of the agency on his own account.

"If an agent without the knowledge of his principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled

(*t*) I. C. A. s. 141. *Mayhew v. Crickett* (1818) 2 Swanst. 185, 191, 19 R. R. 57, 61; *Wulff v. Jay* (1872) L. R. 7 Q. B. 756, 762, 41 L. J. Q. B. 322; *Bechervaise v. Lewis* (1872) L. R. 7 C. P. 372, 41 L. J. C. P. 161; securities now subsist notwithstanding payment of the debt for the benefit of a surety who has paid, Merc. Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 5. A right to distrain for rent is not a security or remedy within this enactment: *Russell v. Shoolbred* (1885) 29 Ch. Div. 254, 53 L. T. 365. During the currency of a bill of exchange an indorser is not a surety for the acceptor. But after notice of dishonour he is entitled in like manner as if he were a surety to the benefit of all payments made and securities

given by the acceptor to the holder: *Duncan, Fox & Co. v. North & South Wales Bank* (1880) 6 App. Ca. 1, revg. s. c. in C. A. 11 Ch. Div. 88, 50 L. J. Ch. 355.

(*u*) *Pledge v. Buss* (1860) Johns. 663.

(*x*) *Ward v. Bank of New Zealand* (1883) (J. C.) 8 App. Ca. 755, 52 L. J. P. C. 65.

(*y*) I. C. A. s. 215. The Indian Act goes on to add, "if the case show either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him," but these qualifications are not recognized in English law. See Story on Agency § 210; *Ex parte Lacey* (1802) 6 Ves. 625, 6 R. R. 9.

to claim from the agent any benefit which may have resulted to him from the transaction" (z).

These rules are well known and established and have been over and over again asserted in the most general terms. The commonest case is that of an agent for sale himself becoming the purchaser, or conversely: "He who undertakes to act for another in any matter shall not in the same matter act for himself. Therefore a trustee for sale shall not gain any advantage by being himself the person to buy." "An agent to sell shall not convert himself into a purchaser unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed" (a). "It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (b). Similarly an agent for sale or purchase must not act for the other party at the same time or take a secret commission from him (c). If the local usage of a particular trade or market countervenes this axiom by "converting a broker employed to buy into a principal selling for himself," it cannot be treated as a custom so as to bind a principal dealing in that trade or market through a broker, but himself ignorant of the usage (d).

(z) I. C. A. s. 216.

(a) *Whichcote v. Lawrence* (1798) 3 Ves. 740; *Lowther v. Lowther* (1806) 13 Ves. 95, 103; and see *Charter v. Trevelyan* (1844) 11 Cl. & F. 714, 732.

(b) Per Willes J. in *Mollett v. Robinson* (1870) L. R. 5 C. P. at p. 655, 39 L. J. C. P. 290. Cp. *Guest v. Smythe* (1870) L. R. 5 Ch. 551, per Giffard L.J. 39 L. J. Ch. 536; *Sharman v. Brandt* (1871) L. R. 6 Q. B. 720, 40 L. J. Q. B. 312.

(c) The latest case, which, if anything, increases the wholesome strictness of the law, is *Grant v. Gold Exploration &c. Syndicate of*

British Columbia [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, C. A.

(d) *Robinson v. Mollett* (1874-5) L. R. 7 H. L. 802, 838, 44 L. J. C. P. 362; and further as to alleged customs of this kind *De Bussche v. Alt* (1877) 8 Ch. Div. 286, 47 L. J. Ch. 386. For the special application of the rule to the duty of directors of companies, *Hay's case* (1875) L. R. 10 Ch. 593, 44 L. J. Ch. 721; *Albion Steel Wire Co. v. Martin* (1875) 1 Ch. D. at p. 585, per Jessel M.R. 45 L. J. Ch. 173; as to promoters, *New Sombrero Phosphate Co. v. Erlanger* (1877) 5 Ch. Div. 73, 46 L. J. Ch. 425.

The rule is not arbitrary or technical, but rests on the principle that an agent cannot be allowed to put himself in a position in which his interest and his duty are in conflict, and the Court will not consider "whether the principal did or did not suffer any injury in fact by reason of the dealing of the agent; for the safety of mankind requires that no agent shall be able to put his principal to the danger of such an inquiry as that." It is a corollary from the main rule that so long as a contract for sale made by an agent remains executory he cannot re-purchase the property from his own purchaser except for the benefit of his principal (*e*). A like rule applies to the case of an executor purchasing any part of the assets for himself. But it is put in this somewhat more stringent form, that the burden of proof is on the executor to show that the transaction is a fair one. This brings it very near to the doctrine of Undue Influence, of which in a later chapter. It makes no difference that the legatee from whom the purchase was made was also co-executor (*f*). Another branch of the same principle is to be found in the rules against trustees and limited owners renewing leases or purchasing reversions for themselves (*g*).

Again: "It may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are to be for the benefit of his employers" (*h*). "If a person makes any profit by being employed contrary to his trust, the employer has a right to call back

(*e*) *Parker v. McKenna* (1874) 10 Ch. 96, 118, 124, 125, 44 L. J. Ch. 425.

(*f*) *Gray v. Warner* (1873) L. R. 16 Eq. 577, 42 L. J. Ch. 556.

(*g*) Notes to *Keech v. Sandford* (1726) in 1 Wh. & T. L. C. The last case on the subject is *Trumper v. Trumper* (1873) L. R. 14 Eq.

295, 8 Ch. 870, 42 L. J. Ch. 641. On the general rule see also *Marsh v. Whitmore* (1874) (Sup. Court, U.S.) 21 Wall. 178.

(*h*) Story on Agency, § 211, adopted by the Court in *Morison v. Thompson* (1874) L. R. 9 Q. B. 480, 485, 43 L. J. Q. B. 215, where several cases are collected.

that profit" (i). And it is not enough for an agent who is himself interested in the matter of the agency to tell his principal that he has some interest: he must give full information of all material facts (k).

Even this is not all: an agent, or at any rate a professional adviser, cannot keep any benefit which may happen to result to him from his own ignorance or negligence in executing his duty. In such a case he is considered a trustee for the persons who would be entitled to the benefit if he had done his duty properly (l).

Nature of remedies applicable.

In this class of cases the rule seems to be that the transaction improperly entered into by the agent is voidable so far as the nature of the case admits. Where it cannot be avoided as against third parties, the principal can recover the profit from the agent. But where there are a principal, an agent, and a third party contracting with the principal and cognizant of the agent's employment, and there are dealings between the third party and the agent which give the agent an interest against his duty, there the principal on discovering this has the option of rescinding the contract altogether. Thus when company A. contracted to make a telegraph cable for company B., and a term of the contract was that the work should be approved by C., the engineer of company B., and C. took an undisclosed sub-contract from company A. for doing the same work; and further it appeared that this arrangement was contemplated when the contract was entered into; it was held that company B. might rescind the contract (m).

(i) *Massey v. Davies* (1794) 2 Ves. 317, 320, 2 R. R. 218.

(k) See authorities collected, and observations of the Court thereon, *Dunne v. English* (1874) L. R. 18 Eq. 524, 534. The developments of the principle in modern company law cannot be followed here. For a recent exposition of its limits, see *Costa Rica R. Co. v. Forwood* [1901]

1 Ch. 746, 70 L. J. Ch. 385, C.A.

(l) *Bulkley v. Wilford* (1834) 2 Cl. & F. 102, 37 R. R. 39. Cp. *Corley v. Lord Stafford* (1857) 1 De G. & J. 238. As to alternative remedies, see *Grant's case*, p. 286, above.

(m) *Panama & S. Pacific Telegraph Co. v. India Rubber, &c. Co.* (1875) L. R. 10 Ch. 515, 45 L. J. Ch. 121.

(c) The rule as to settlements "in fraud of marital right" was thus given by Lord Langdale (n) :—

Settle-
ments in
fraud of
marital
right.

"If a woman entitled to property enters into a treaty for marriage and during the treaty represents to her intended husband that she is so entitled that upon her marriage he will become entitled *jure mariti*, and if during the same treaty she clandestinely conveys away the property in such manner as to defeat his marital right and secure to herself the separate use of it, and the concealment continues till the marriage takes place, there can be no doubt but that a fraud is thus practised on the husband and he is entitled to relief" (o).

Moreover—"If both the property and the mode of its conveyance, pending the marriage treaty, were concealed from the intended husband, as in the case of *Goddard v. Snow* (p), there is still a fraud practised on the husband. The non-acquisition of property of which he had no notice is no disappointment, but still his legal right to property actually existing is defeated" (q).

The Married Women's Property Act, 1882, has made the subject obsolete in this country as regards all marriages contracted after its commencement, and there has been no reported decision for many years. It is now thought advisable to omit the details given in former editions.

4. Marriages within the prohibited degrees of kindred and affinity are another class of transactions contrary to positive law. For although no direct temporal penalties are attached to them, they have been made the subject of express and definite statutory prohibition (r). They formerly could not be treated as void unless declared so by an ecclesiastical Court in the lifetime of the parties: but

4. Mar-
riage
within
prohibited
degrees.

(n) Cp. on this subject *Dav. Conv.* vol. 3, pt. 2, 707.

(o) *England v. Downs* (1840) 2 Beav. 522, 528, 50 R. R. 268, 272, 273.

(p) (1826) 1 Russ. 485. See the earlier authorities there discussed.

(q) *England v. Downs*, 2 Beav. 529; 50 R. R. 273. Cp. *Downes v. Jennings* (1863) 32 Beav. 290, 294. See further *St. George v. Wake* (1831-3) 1 My. & K. 610, 625, 36

R. R. 389; *Wrigley v. Swainson* (1849) 3 De G. & Sm. 458; *Prideaux v. Lonsdale* (1863) 4 Giff. 159, on appeal, 1 D. J. S. 433, 438, no decision on this part of the case; *Taylor v. Pugh* (1842) 1 Hare 608.

(r) 32 H. 8, c. 38, and earlier repealed statutes of the same reign. It is the better supported opinion that 5 & 6 Wm. 4, c. 54, does not contain any new substantive prohibition. See *Brook v. Brook* (1861) 9 H. L. C. 193.

by a modern statute (5 & 6 Wm. 4, c. 54) they are now absolutely void for all purposes. An executory contract to marry within the prohibited degrees is of course absolutely void also (*s*), and would indeed have been so before the statute. These rules are not local, like other rules of municipal law prescribing the solemnities of the marriage ceremony, requiring the consent of particular persons, or the like: the legislature has referred the prohibition to public grounds of a general nature (speaking of these marriages as "contrary to God's law") (*t*), and it concerns not the form but the substance of the contract; it therefore applies to the marriages of domiciled British subjects, in whatever part of the world the ceremony be performed, and whether the particular marriage is or is not of a kind allowed by the local law (*u*).

Where a marriage has been contracted in England between foreigners domiciled abroad, English Courts will recognize disabilities, though not being *iuris gentium*,

(*s*) It seems from *Millward v. Littlewood* (1850) 5 Ex. 775, 20 L. J. Ex. 2, that in the barely possible case of the relationship being known to only one of the parties, by whom it is fraudulently concealed from the other, the innocent party may sue as for a breach of contract, though the performance of the agreement would be unlawful. Here the ground of liability is really not contract but estoppel.

(*t*) The use of these particular words seems of little importance. It would certainly appear bold to apply them to marriages which are permissible by dispensation in the Canon law, and allowed unconditionally by the German Civil Code. The true reason is shortly put by Savigny, Syst. 8. 326: "die hier einschlagenden Gesetze, die auf sittlichen Rücksichten beruhen, haben eine streng positive Natur." Savigny's authority is perhaps sufficient to defend the doctrine of *Brook v. Brook* against the caustic criticism passed upon it by the

Chief Justice of Massachusetts in *Commonwealth v. Lane* (1873) 113 Mass. at p. 473:—

"The judgment proceeds upon the ground that an Act of Parliament is not merely an ordinance of man but a conclusive declaration of the law of God; and the result is that the law of God, as declared by Act of Parliament, and expounded by the House of Lords, varies according to the time, place, length of life of parties, pecuniary interests of third persons, petitions to human tribunals, and technical rules of statutory construction and judicial procedure."

(*u*) *Brook v. Brook* (1861) 9 H. L. C. 193. See per Lord Campbell at p. 220. He also doubted whether a marriage allowed by the law of the place, but contracted by English subjects who had come there on purpose to evade the English law, would be recognized even by the local courts. Cp. *Sottomayor v. De Barros*, *infra*.

imposed by the law of the domicile of both parties (x): but a marriage celebrated in England is not held invalid by English Courts on the ground that one of the parties is subject by the law of his or her domicile to a prohibition not recognized by English law, at all events where the other party's domicile is English (y).

The "Act for the better regulating the future marriages of the Royal Family" (12 Geo. 3, c. 11) imposes on the persons within its operation disabilities (absolute before the age of 25, qualified after that age) to marry without the consent of the Sovereign; and this disability is personal, not local, so that a marriage without consent is equally invalid wherever celebrated (z).

Royal
Marriage
Act.

5. Moreover a great variety of dealings of which contracts form part, or to which they are incident in the ordinary course of affairs, are for extremely various reasons forbidden or restricted by statute. In the eighteenth century, in particular, Acts of Parliament regulating the conduct of sundry trades and occupations were strangely multiplied. Most of these are now repealed, but the decisions upon them established principles on which our Courts still act in dealing with statutes of this kind.

5. Agree-
ments
illegal by
statute.

The question whether a particular transaction comes within the meaning of a prohibitory statute is manifestly one of construction. So far as we have to do with it here, we have in each case to ask, Does the Act mean to forbid this agreement or not? And in each case the language of the particular Act must be considered on its own footing. Decisions on the same Act may of course afford direct authority. But decisions on more or less similar enact-

Construc-
tion of
prohibi-
tory
statutes.

(x) *Sottomayor v. De Barros* (1877)
3 P. Div. 1, 47 L. J. P. 23.

(y) *Sottomayor v. De Barros* (1879)
5 P. D. 94, dissenting from some
dicta in the previous judgment of
the C. A., which however went on
a supposed different state of the
facts. See further, on this per-

plexed topic, Sir Howard Elphinstone's "Notes on the English Law of Marriage" in L. Q. R. v. 44, and the chapter on Marriage in Dicey, "Conflict of Laws."

(z) *The Sussex Peerage case* (1844)
11 Cl. & F. 85.

ments, and even on previous enactments on the same subject, cannot as a rule be regarded as giving more than analogies. Attempts have indeed been made at different times to lay down fixed rules, nominally of construction, but really amounting to rules of law which would control rather than ascertain the expressed intention of the legislature. But in recent times our Courts have fully and explicitly disclaimed any such powers of interpretation.

“The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act;” provided that the words be “sufficient to accomplish the manifest purpose of the Act” (a).

The effect of plain and unambiguous words is not to be limited by judicial construction even though anomalous results should follow (b).

Policy of
statutes.

On the other hand the general intention is to be regarded, and may if necessary prevail over particular expressions, no less than in the interpretation of private instruments. But it must also be an intention collected from what the legislature has said, not arrived at by conjectures of what the legislature might or ought to have meant (c). A transaction not in itself immoral is not to be held unlawful on a conjectural view of the policy of a statute (d). The true policy of a statute is for a court of justice neither more nor less than its true construction. The Courts no longer undertake either to cut short or to widen the effect of legislation according to their views of what ought to be the

(a) Opinion of the Judges in the *Sussex Peerage case* 11 Cl. & F. at p. 143, per Tindal C.J.; per Lord Brougham at p. 150. And see per Knight Bruce L.J. *Crofts v. Middleton* (1856) 8 D. M. G. at p. 217; per Lord Blackburn, in *River Wear Commrs. v. Adamson* (1877) 2 App. Ca. at p. 764, 47 L. J. Q. B. 193.

(b) *Cargo ex Argos, &c.* (1872-3) L. R. 5 P. C. at pp. 152-3. The doctrine formerly current (in accordance with the prevailing speculative opinion on the Continent), that

statutes might be disregarded if the Courts thought them contrary to reason, common right, or natural equity (all synonymous terms for this purpose), has long been repudiated: see per Willes J. *Lee v. Bude, &c. Ry. Co.* (1871) L. R. 6 C. P. 576, 582, 40 L. J. C. P. 285; cp. *Journ. Soc. Comp. Leg. N.S.* ii. at p. 423.

(c) Cp. pp. 255, 256, above.

(d) *Barton v. Muir* (1874) L. R. 6 P. C. 134, 44 L. J. P. C. 19.

law. "Before we can make out that a contract is illegal under a statute, we must make out distinctly that the statute has provided that it shall be so" (e).

The cases in which acts of corporate bodies created for special purposes have been held void as "contrary to the policy of the legislature" and tending to defeat the objects of the incorporation have already been considered in Ch. II.

These principles, when applied to the more limited subject-matter of prohibitory statutes, give the following corollaries:

(a). When a transaction is forbidden, the grounds of the prohibition are immaterial. Courts of justice cannot take note of any difference between <i>mala prohibita</i> (i.e. things which if not forbidden by positive law would not be immoral) and <i>mala in se</i> (i.e. things which are so forbidden as being immoral).	Rules. a. No difference between <i>malum prohibitum</i> and <i>malum in se</i> .
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(b). The imposition of a penalty by the legislature on any specific act or omission is <i>prima facie</i> equivalent to an express prohibition.	b. Penalty <i>prima facie</i> imports prohibition.
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These rules are established by the case of *Bensley v. Bignold* (f), which decided that a printer could not recover for his work or materials when he had omitted to print his name on the work printed, as then required by statute (g). It was argued that the contract was good, as the Act contained no specific prohibition, but only a direction sanctioned by a penalty. But the Court held unanimously that this was untenable, and a party could not be permitted to sue on a contract where the whole subject-matter was "in direct violation of the provisions of an Act of Parliament." And Best J. said that the distinction between *mala prohibita* and *mala in se* was long since exploded. The same doctrine has repeatedly been enounced in later cases.

(e) Field J. 4 Q. B. D. at p. 224.

(f) (1822) 5 B. & Ald. 335, 24

R. R. 401.

(g) See now 32 & 33 Vict. c. 24.

Thus, for example, by the Court of Exchequer :

“ Where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no Court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition ” (h).

It is needless to discuss the “ policy of the law ” when it is distinctly enunciated by a statutory prohibition (i).

c. But absence of penalty does not alter express prohibition.

d. What may not be done directly must not be done indirectly.

Booth v. Bank of England.

(c). Conversely, the absence of a penalty, or the failure of a penal clause in the particular instance, will not prevent the Court from giving effect to a substantive prohibition (k).

(d). What the law forbids to be done directly cannot be made lawful by being done indirectly.

In *Booth v. Bank of England* (l) a joint-stock bank procured its manager to accept certain bills on the understanding that the bank would find funds, these bills being such as the bank itself could not have accepted without violating the privileges of the Bank of England. It was held by the House of Lords, following the opinion of the judges, that this proceeding “ must equally be a violation of the rights and privileges of the Bank of England, upon the principle that whatever is prohibited by law to be done directly cannot legally be effected by an indirect and circuitous contrivance : ” for the acceptor was merely nominal, and the bills were in fact meant to circulate on the credit of the bank.

Bank of U. S. v. Owens.

In *Bank of United States v. Owens* (m) (Supreme Court, U.S.) the charter of the bank forbade the taking of a

(h) *Cope v. Rowlands* (1836) 2 M. & W. 149, 157, 46 R. R. 532, 539. Cp. *Chambers v. Manchester & Milford Ry. Co.* (1864) 5 B. & S. 588, 33 L. J. Q. B. 268 ; *Re Cork & Youghal Ry. Co.* (1869) L. R. 4 Ch. 748, 758, 30 L. J. Ch. 277.

(i) See per Lord Cranworth, *Ex parte Neilson* (1853) 3 D. M. G. 556,

566.

(k) *Sussex Peerage case* (1844) 11 Cl. & F. at pp. 148-9.

(l) (1840) 7 Cl. & F. 509, 540, 51 R. R. 36, upholding *Bank of England v. Anderson* (1836) 2 Keen 328, 3 Bing. N. C. 589, 44 R. R. 271.

(m) (1829) 2 Peters 527.

greater rate of interest than six per cent., but did not say that a contract should be void in which such interest was taken. A note payable in gold was discounted by a branch of the bank in a depreciated local paper currency at its nominal value, so that the real discount was much more than six per cent. The Court held this transaction void, though there was no express prohibition of an *agreement* to take higher interest, and though the charter spoke only of *taking*, not of *reserving* interest. Parts of the judgment are as follows: "A fraud upon a statute is a violation of the statute." "It cannot be permitted by law to stipulate for the reservation of that which it is not permitted to receive. In those instances in which Courts are called upon to inflict a penalty it is necessarily otherwise; for then the actual receipt is generally necessary to consummate the offence. But when the restrictive policy of a law alone is in contemplation, we hold it to be an universal rule that it is unlawful to contract to do that which it is unlawful to do."

"There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal . . . there is no distinction as to vitiating the contract between *malum in se* and *malum prohibitum*" (n).

The cases are similar in principle in which transactions have been held void as attempts to evade the bankruptcy law: thus, to take only one example, a stipulation that a security shall be increased in the event of the debtor's bankruptcy, or any provision designed for the like purpose and having the like effect, is void (o).

(n) 2 Peters 536, 539.

(o) *Ex parte Mackay* (1873) L. R. 8 Ch. 643, 42 L. J. Bk. 68; *Ex parte Williams* (1877) 7 Ch. Div. 138, where the device used was the attornment of the debtor to his mortgagee at an excessive rent; *Ex parte Jackson* (1880) 14 Ch. Div.

725. It must be shown, to vitiate a transaction on this ground, that the provision was inserted in contemplation of bankruptcy and for the purpose of defeating the bankruptcy law: *Ex parte Voisey* (1882) 21 Ch. Div. 442, 461, 52 L. J. Ch. 121.

Where conditions prescribed for conduct of particular trade, &c., non-observance of them—
e. avoids agreements if the conditions are for general public purposes;
f. not if for merely administrative purposes.

Illustrations.

When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession—

(*e*). are void if it appears by the context that the object of the legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed:

(*f*). are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.* the convenient collection of the revenue.

The following are instances illustrating this distinction:—

AGREEMENT VOID.

Ritchie v. Smith (1848) 6 C. B. 462, 18 L. J. C. P. 9. The owner of a licensed house underlet part of it to another person, in order that he might there deal in liquor on his own account under colour of his lessor's licence and without obtaining a separate licence. This agreement was void, its purpose being to enable one of the parties to infringe an Act passed for the protection of public morals: (the licensing Acts are of this nature, and not merely for the benefit of the revenue, for this reason, that licences are not to be had as a matter of right by paying for them). For the same reason and also because there is a specific penalty for each offence against the licensing law, it seems that a sale of liquor in an unlicensed house is void (*p*). *Hamilton v. Grainger* (1859) 5 H. & N. 40.

Taylor v. Crowland Gas Co. (1854) 10 Ex. 293, 23 L. J. Ex. 254. A penalty being imposed by statute on unqualified persons acting as conveyancers (*q*), the Court held that the object was not merely the gain to the revenue from the duties on certificates, but the protection of the public from unqualified practitioners; an unqualified person was therefore not allowed to recover for work of this nature. Cp. *Leman v. Houseley* (1874) L. R. 10 Q. B. 66, 44 L. J. Q. B. 22.

Fergusson v. Norman (1838) 5 Bing. N. C. 76, 50 R. R. 613. When a

(*p*) For the penal enactments now in force see the Licensing Acts, 1872—1874.

(*q*) Now by 33 & 34 Vict. c. 97, s. 60.

pawnbroker lent money without complying with the requirements of the statute, the loan was void and he had no lien on the pledge (*r*).

In *Stevens v. Gourley* (1859) 7 C. B. N. S. 99, 29 L. J. C. P. 1, a builder was not allowed to recover the price of putting up a wooden shed contrary to the regulations imposed by the Metropolitan Building Act, 18 & 19 Vict. c. 122. The only question in the case was whether the structure was a *building* within the Act. But note that here the prohibition was for a public purpose, namely, to guard against the risk of fire.

Barton v. Piggott (1874) L. R. 10 Q. B. 86. By 5 & 6 Wm. 4, c. 50, s. 46, a penalty is imposed on any surveyor of highways who shall have an interest in any contract, or sell materials, &c. for work on any highway under his care, unless he first obtain a licence from two justices. The effect of this is that an unlicensed contract by a surveyor to perform work or supply materials for any highway under his care is absolutely illegal, and there is no discretion to allow payments in respect of it.

CONTRACT NOT AVOIDED.

Bailey v. Harris (1849) 12 Q. B. 905, 18 L. J. Q. B. 115. A contract of sale is not void merely because the goods are liable to seizure and forfeiture to the Crown under the excise laws.

Smith v. Mawhood (1845) 14 M. & W. 452, 15 L. J. Ex. 149. The sale of an exciseable article is not avoided by the seller having omitted to paint up his name on the licensed premises as required by 6 Geo. 4, c. 81, s. 25. Probably this decision would govern the construction of the very similar enactment in the Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 11.)

Smith v. Lindo (1858) 4 C. B. N. S. 395, in Ex. Ch. 5 C. B. N. S. 587, 27 L. J. C. P. 196, 335. One who acts as a broker in the City of London without being licensed under 6 Ann. c. 68 (Rev. Stat.: al. 16) and 57 Geo. 3, c. lx. (*s*) cannot recover any commission, but a purchase of shares made by him in the market is not void: and if he has to pay the purchase-money by the usage of the market, he can recover from his principal the money so paid.

And in general an agreement which the law forbids to be made is void if made. But an agreement forbidden by

(*r*) The present Pawnbrokers Act (1872; 35 & 36 Vict. c. 93, s. 51), enacts that an offence against the Act by a pawnbroker, not being an offence against any provision relating to licences, shall not avoid the contract or deprive him of his lien.

(*s*) These Acts are repealed as to the power of the city court to make rules, &c., but not as to the necessity of brokers being admitted, by the somewhat obscurely framed London Brokers' Relief Act, 1870, 33 & 34 Vict. c. 60.

statute may be saved from being void by the statute itself, and on the other hand an agreement made void or not enforceable by statute is not necessarily illegal. An agreement may be forbidden without being void, or void without being forbidden.

g. Agreement not void though forbidden, if statute expressly so provides.

(*g*). Where a statute forbids an agreement, but says that if made it shall not be void, then if made it is a contract which the Court must enforce.

By 1 & 2 Vict. c. 106, it is unlawful for a spiritual person to engage in trade, and the ecclesiastical Court may inflict penalties for it. But by s. 31 a contract is not to be void by reason only of being entered into by a spiritual person contrary to the Act. It was contended without success in *Lewis v. Bright* (*t*) that this proviso could not apply when the other party knew with whom he was dealing. But the Court held that the knowledge of the other party was immaterial; the legislature meant to provide against the scandal of such a defence being set up. And Erle J. said that one main purpose of the law was to make people perform their contracts, and in this case it fortunately could be carried out.

h. Agreement may be simply not enforceable, but not otherwise unlawful.

(*h*). Where no penalty is imposed, and the intention of the legislature appears to be simply that the agreement is not to be enforced, there neither the agreement itself nor the performance of it is to be treated as unlawful for any other purpose.

Modern legislation has produced some very curious results of this kind. In several cases the agreement cannot even be called void, being good and recognizable by the law for some purposes or for every purpose other than that of creating a right of action. These cases are reserved for a special chapter (*u*).

(*t*) (1855) 4 E. & B. 917, 24 L. J. Q. B. 191.

(*u*) See Ch. XIII., On Agreements of Imperfect Obligation.

In the case of wagers the agreement is null and void by 8 & 9 Vict. c. 109, s. 18, and money won upon a wager cannot be recovered either from the loser or from a stakeholder (with a saving as to subscriptions or contributions for prizes or money to be awarded "to the winner of any lawful game, sport, pastime, or exercise"; the saving extends only to cases where there is a real competition between two or more persons (*x*), and the "subscription or contribution" is not money deposited with a stakeholder by way of wager) (*y*). Wagers were not as such unlawful or unenforceable at common law: and since the statute does not create any offence or impose any penalty, a man may still without violating any law make a wager, and if he loses it pay the money or give a note for the amount (*z*). The consideration for a note so given is in point of law not an illegal consideration, but merely no consideration at all. The difference is important to the subsequent holder of such a note. If the transaction between the original parties were fraudulent or in the proper sense illegal, the burden of proof would be on the holder to show that he was in fact a holder for value; but here the ordinary presumption in favour of the holder of a negotiable instrument is not excluded (*a*). At common law "if a party

Wagers.
Void, but
not abso-
lutely
illegal.
Fitch v.
Jones.

The distinction between an enactment which imposes a penalty without making the transaction void, and one which makes the forbidden transaction void, is expressed in Roman law by the terms *minus quam perfecta lex* and *perfecta lex*. Ulp. Reg. 1 § 2, cp. Sav. Syst. 4. 550. A constitution of Theodosius and Valentinian (Cod. 1. 14. de leg. 5) enjoined that all prohibitory enactments were to be construed as avoiding the transactions prohibited by them (that is, as *leges perfectae*) whether it were so expressed or not.

(*x*) *E.g.* a wager that a horse will trot eighteen miles in an hour is not within it, as there can be no

winner in the true sense of the clause: *Batson v. Newman* (1876) 1 C. P. Div. 573. Nor a so-called competition where the event is determined by chance or by a choice so arbitrary as to be equivalent to chance: *Barclay v. Pearson* (the "missing word" case) [1893] 2 Ch. 154, 62 L. J. Ch. 636.

(*y*) *Diggle v. Higgs* (1877) 2 Ex. Div. 422, 46 L. J. Ex. 721; *Trimble v. Hill* (1879) (J. C.) 5 App. Ca. 342, 49 L. J. P. C. 49.

(*z*) As to British India see *Queen-Empress v. Narottam Dás Motirám* (1889) 1 L. R. 13 Bom. 681, a curious case on the common Indian sport of "rain-gambling."

(*a*) *Fitch v. Jones* (1855) 5 E. &

loses a wager and requests another to pay it for him, he is liable to the party so paying it for money paid at his request" (b); but the Gaming Act, 1892, makes all such payments irrecoverable (c), as also a loan of money to be used for a wager, and to be repaid only if the borrower wins (d).

Attempts have been made to evade the operation of the principal Act in gambling transactions for "differences" in stocks by colourable provisions for the completion of purchase and delivery or receipt of the stocks. Whether the intention of the parties was really to buy and sell, or to wager on the price of the stocks, is a question of fact on which the verdict of a jury will not be disturbed if on the agreement as a whole there is evidence of a gambling intention (e). Nor will provisions of this kind validate an agreement which is otherwise a gambling agreement on the face of it (f).

Under another modern statute (5 & 6 Wm. 4, c. 41, s. 1) securities for money won at gaming or betting on games, or lent for gaming or betting, are treated as given for an illegal consideration (g).

Lotteries are forbidden by penal statutes (h).

It would be inappropriate to the general purpose of this work, as well as impracticable within its limits, to enter in detail upon the contents or construction of the statutes which prohibit or affect various kinds of contracts by regulating particular professions and occupations or otherwise.

B. 238, 24 L. J. Q. B. 293, see judgments of Lord Campbell C.J. and Erle J.

(b) *Rosewarne v. Billing* (1863) 15 C. B. N. S. 316, 33 L. J. C. P. 55.

(c) 55 Vict. c. 9, *Tatam v. Reeve*, [1893] 1 Q. B. 44, 62 L. J. Q. B. 30.

(d) *Carney v. Plimmer* [1897] 1 Q. B. 634, 66 L. J. Q. B. 415, C. A.

(e) *Universal Stock Exchange, Ltd. v. Strachan* [1896] A. C. 166, 65 L. J. Q. B. 429.

(f) *Re Gieve* [1899] 1 Q. B. 794, 68 L. J. Q. B. 509, C. A.

(g) The statute does not affect a loan of money to pay a debt previously lost: *Ex parte Pyke* (1878) 8 Ch. Div. 754, 47 L. J. Bk. 100. As to recovering money deposited with a stakeholder or agent, see pp. 382, 383, below.

(h) See Note G. in Appendix. Various innocent and not uncommon ways of raising money for charitable objects are probably within the letter of these Acts.

It has been attempted, however, to make some collection of them in the appendix (i).

The rules and principles of law which disallow agreements whose object is to contravene or evade an Act of Parliament do not apply to private Acts, so far as these are in the nature of agreements between parties. If any of the persons interested make arrangements between themselves to waive or vary provisions in a private Act relating only to their own interests, it cannot be objected to such an agreement that it is in derogation of, or an attempt to repeal the Act (k).

Agreements in derogation of private Acts of Parliament not necessarily bad.

B. *Agreements contrary to morals or good manners.*

It is not every kind of immoral object or intention that will vitiate an agreement in a court of justice. When we call a thing immoral in a legal sense we mean not only that it is morally wrong, but that according to the common understanding of reasonable men it would be a scandal for a court of justice to treat it as lawful or indifferent, though it may not come within any positive prohibition or penalty. What sort of things fall within this description is in a general way obvious enough. And the law might well stand substantially as it is, according to modern decisions at any rate, upon this ground alone. Some complication has been introduced, however, by the influence of ecclesiastical law, which on certain points has been very marked, and which has certainly brought in a tendency to treat these cases in a peculiar manner, to mix up the principles of ordinary social morality with considerations of a different kind, and with the help of those considerations to push them sometimes to extreme conclusions. Having regard to the large powers formerly exercised by spiritual Courts in the control of opinions and conduct,

B. Contrary to positive morality. Practically this means only sexual morality.

Influence of ecclesiastical law.

(i) See Note G.

(k) *Savin v. Hoylake Ry. Co.* (1865) L. R. 1 Ex. 9, 35 L. J. Ex.

52. Cp. and dist. *Shaw's claim* (1875) L. R. 10 Ch. 177, 44 L. J. Ch. 670.

and even now technically not abolished, it seems certain that everything which our civil Courts recognize as immoral is an offence against ecclesiastical law. Perhaps, indeed, the converse proposition is theoretically true, so far as the ecclesiastical law is not directly contrary to the common law (*l*). But this last question may be left aside as merely curious.

As a matter of fact sexual immorality, which formerly was and in theory still is one of the chief subjects of ecclesiastical jurisdiction, is the only or almost the only kind of immorality of which the common law takes notice as such. Probably drunkenness would be on the same footing. It is conceived, for example, that a sale of intoxicating liquor to a man who then and there avowed his intention of making himself or others drunk with it would be void at common law. The actual cases of sale of goods and the like for immoral purposes, on whose analogy this hypothetical one is put, depend on the principles applicable to unlawful transactions in general, and are accordingly reserved for the last part of this chapter. Putting apart for the present these cases of indirectly immoral agreements, as they may be called, we find that agreements are held directly immoral in the limited sense above mentioned, on one of two grounds: as providing for or tending to illicit cohabitation, or as tending to disturb or prejudice the status of lawful marriage ("in derogation of the marriage contract," as it is sometimes expressed).

Illicit cohabitation—if future, an *illegal* consideration: if past, no consideration.

With regard to the first class, the main principle is this. The promise or expectation of future illicit cohabitation is an unlawful consideration, and an agreement founded on it is void. Past cohabitation is not an unlawful consideration; indeed, there may in some circumstances be a moral obligation on the man to provide for the woman; but the

(*l*) Cp. Lord Westbury's remarks in *Hunt v. Hunt* (1861-2) 4 D. F. J. at pp. 226-8, 233.

general rule applies (*m*) that a past executed consideration, whether such as to give rise to a moral duty or not, is equivalent in law to no consideration at all. An agreement made on no other consideration than past cohabitation is therefore in the same plight as any other merely voluntary agreement. If under seal it is binding and can be enforced (*n*), otherwise not (*o*). The existence of an express agreement to discontinue the illicit cohabitation, which is idle both in fact (as an agreement which neither party could break alone) and in law—or the fact of the defendant having previously seduced the plaintiff, which “adds nothing but an executed consideration resting on moral grounds only,”—can make no difference in this respect (*o*).

The manner in which these principles are applied has been thus stated by Lord Selborne:—

Judgment
of Lord
Selborne,
Ayerst v.
Jenkins.

“Most of the older authorities on the subject of contracts founded on immoral consideration are collected in the note to *Benyon v. Nettlefold* (*p*). Their results may be thus stated: 1. Bonds or covenants founded on past cohabitation, whether adulterous (*q*), incestuous, or simply immoral, are valid in law and not liable (unless there are other elements in the case) to be set aside in equity. 2. Such bonds or covenants, if given in consideration of future cohabitation, are void in law (*r*), and therefore of course also void in equity. 3. Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument (*s*). 4. If an illegal consideration does not appear on the face of the instrument the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at

(*m*) But the rule is modern (Ch. IV. p. 181 above), and the earlier cases on this subject belong to a time when a different doctrine prevailed; they therefore discuss matters which in the modern view are simply irrelevant, *e.g.* the previous character of the parties. The phrase *praemium pudicitiae* comes from this period. *Praemium pudoris*, however, was used in a perfectly innocent sense in the old law of dower: Co. Lit. 31a.

(*n*) *Gray v. Mathias* (1800) 5 Ves. 286, 5 R. R. 48.

(*o*) *Beaumont v. Reeve* (1846) 8 Q. B. 483, 15 L. J. Q. B. 141.

(*p*) (1850) 3 Mac. & G. 94, 100.

(*q*) *Knye v. Moore* (1822) 1 Sim. & St. 64.

(*r*) *Walker v. Perkins* (1764) 3 Burr. 1568.

(*s*) *Gray v. Mathias* (1800) 5 Ves. 286, 5 R. R. 48; *Smyth v. Griffin* (1842) 13 Sim. 245, 14 L. J. Ch. 28, appears to be really nothing else than an instance of the same rule. The rule is or was a general one: *Simpson v. Lord Howden* (1837) 3 My. & Cr. 97, 102, 45 R. R. 225, 226.

law (*t*), [this is of no consequence in England since the Judicature Acts].
 5. Under some (but not under all) circumstances when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity" (*u*).

The exception alluded to in the last sentence is probably this: that "where a party to the illegal or immoral purpose comes himself to be relieved from the obligation he has contracted in respect of it, he must state distinctly and exclusively such grounds of relief as the Court can legally attend to" (*x*). He must not put his case on the ground of an immoral consideration having in fact failed, or complain that the instrument does not correctly express the terms of an immoral agreement (*y*).

Where a security is given on account of past cohabitation, and the illicit connection is afterwards resumed, or even is never broken off, the Court will not presume from that fact alone that the real consideration was future as well as past cohabitation, nor therefore treat the deed as invalid (*z*).

There existed a notion that in some cases the legal personal representative of a party to an immoral agreement might have it set aside, though no relief would have been given to the party himself in his lifetime: but this has been pronounced "erroneous and contrary to law" (*a*). An actual transfer of property, which is on the face of it "a completed voluntary gift, valid and irrevocable in law" and confers an absolute beneficial interest, cannot be afterwards impeached either by the settlor or by his representatives, though in fact made on an immoral consideration (*a*).

(*t*) *Benyon v. Nettlefold* (1850) 3 Mac. & G. 94.

(*u*) *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275, 282, 42 L. J. Ch. 690.

(*x*) *Batty v. Chester* (1842) 5 Beav. 103, 109.

(*y*) *Semble*, relief will not be given if it appears that the immoral consideration has been executed: *Sis-*

ney v. Eley (1849) 17 Sim. 1, 18 L. J. Ch. 350: but the case is hardly intelligible.

(*z*) *Gray v. Mathias* (1800) 5 Ves. 286, 5 R. R. 48; *Hall v. Palmer* 3 Ha. 532; *Vallance v. Blagden* (1884) 26 Ch. D. 353.

(*a*) *Ayerst v. Jenkins* (1873) L. R. 16 Eq. 275, 281, 284, 42 L. J. Ch. 690.

But it by no means follows that the Court will enforce the trusts. It may have to direct the trustees whom to pay, and will then disregard any disposition which is in fact founded on an immoral consideration (c). Thus a settlement in the form of an ordinary marriage settlement in contemplation of a marriage (as with a deceased wife's sister) not allowed by English law is treated, as regards trusts for the so-called wife, as made on an immoral consideration, and the Court will pronounce such trusts invalid if applied to by the trustees for directions, though it would not set aside the settlement at the instance of the settlor (d).

Where parties who have been living together in illicit cohabitation separate, and the man covenants to pay an annuity to the woman, with a proviso that the annuity shall cease or the deed shall be void if the parties live together again, there the covenant is valid as a simple voluntary covenant to pay an annuity, but the proviso is wholly void. It makes no difference, of course, if the parties, being within the prohibited degrees of affinity, have gone through the form of marriage, and the deed is in the ordinary form of a separation deed between husband and wife (e). When the parties are really married such a proviso is usual but superfluous, for the deed is in any case avoided by the parties afterwards living together (f). This brings us to the second branch of this topic, namely the validity of separation deeds and agreements for separation.

Proviso for reconciliation in quasi separation deed is void.

The history of the subject will be found very clearly set forth in Lord Westbury's judgment in *Hunt v. Hunt* (g). From the ecclesiastical point of view marriage was a sacrament creating an indissoluble relation. The duties

Separation deeds in general. *Hunt v. Hunt*.

(c) *Phillips v. Probyn* [1899] 1 Ch. 811, 68 L. J. Ch. 401.

(d) *Phillips v. Probyn*, last note.

(e) *Ex parte Naden* (1874) L. R. 9 Ch. 670, 43 L. J. Bk. 121.

(f) *Westmeath v. Salisbury* or *Westmeath* (1820-1) 5 Bli. N. S.

P.

339, 1 Dow & Cl. 519, 35 R. R. 54.

(g) (1861-2) 4 D. F. J. 221. The case was taken to the House of Lords, but the proceedings came to an end without any decision by the death of the husband: see per Lord Selborne, 8 App. Ca. at p. 421.

attaching to that relation were "of the highest possible religious obligation" and paramount to the will of the parties. In ecclesiastical Courts an agreement or provision for a voluntary separation present or future was simply an agreement to commit a continuing breach of duties with which no secular authority could meddle, and therefore was illegal and void.

For a long while all causes touching marriage even collaterally were claimed as within the exclusive jurisdiction of those courts. The sweeping character and the gradual decay of such claims have already been illustrated by cases we have had occasion to cite from the Year Books in other places. In later times the ecclesiastical view of marriage was still upheld, so far as the remaining ecclesiastical jurisdiction could uphold it (*h*), and continued to have much influence on the opinions of civil Courts; the amount of that influence is indeed somewhat understated in Lord Westbury's exposition. But the common law, when once its jurisdiction in such matters was settled, never adopted the ecclesiastical theory to the full extent. A contract providing for and fixing the terms of an immediate separation is treated like any other legal contract, only the ordinary rule that the wife cannot contract with her husband without the intervention of a trustee is dispensed with in these cases (*i*). Being good and enforceable at law, the contract is also good and enforceable in equity, nor is there any reason for refusing to enforce it by any of the peculiar remedies of equity. In *Hunt v. Hunt* the husband was restrained from suing in the Divorce Court for restitution of conjugal rights in violation of his covenant in a separation deed (*k*), on the authority of the decision of the House of Lords (*l*), which had already established

Wilson v. Wilson.

(*h*) See 4 D. F. J. 235-8.

(*i*) P. 84, above, *McGregor v. McGregor* (1888) 21 Q. B. Div. 424, 57 L. J. Q. B. 268.

(*k*) This covenant could not then

be pleaded in the Divorce Court, which held itself bound by the former ecclesiastical practice to take no notice of separation deeds.

(*l*) *Wilson v. Wilson* (1854) 1 H. L. C. 538.

that the Court may order specific performance of an agreement to execute a separation deed containing such a covenant. The case may be taken as having put the law on a consistent and intelligible footing, though not without overruling a great number of pretty strong dicta of various judges in the Court of Chancery and even in the House of Lords (*m*); and it has been repeatedly followed (*n*). But an agreement by the wife not to oppose proceedings for a divorce pending at the suit of the husband is void, being not only in derogation of the marriage contract, but a collusive agreement to evade the due administration of justice (*o*).

We have seen that when it is sought to obtain the specific performance of a contract the question of consideration is always material, even if the instrument is under seal. Generally it is part of the arrangement in these cases that the trustees shall indemnify the husband against the wife's debts, and this is an ample consideration for a promise on the husband's part to make provision for the wife, and of course also for his undertaking to let her live apart from him, enjoy her property separately, &c. (*p*). But this particular consideration is by no means necessary. The trustee's undertaking to pay part of the costs of the agreement will do as well. But if the agreement is to execute a separation deed containing all usual and proper clauses, this includes, it seems, the usual covenant for indemnifying the husband, so that the usual consideration is

Consideration for agreements for separation deeds.

(*m*) In *St. John v. St. John* (1803-5) 11 Ves. 526, &c., *Westmeath v. Westmeath* (1820-1) 1 Jac. 142 (Lord Eldon); *Worrall v. Jacob* (1816-7) 3 Mer. 268 (Sir W. Grant); *Warrender v. Warrender* (1835) 2 Cl. & F. 527 (Lord Brougham), 561-2 (Lord Lyndhurst). Most of these are to be found cited in the argument in *Wilson v. Wilson*. And even since that case *Vansittart v. Vansittart* (1858) 2 De G. & J. at

p. 255 (Lord Chelmsford).

(*n*) *Besant v. Wood* (1879) 12 Ch. D. at p. 623; *Sweet v. Sweet* [1895] 1 Q. B. 12, 64 L. J. Q. B. 108; *Marshall v. Marshall* (1879) 5 P. D. 19, 48 L. J. P. 49. A like covenant on the wife's behalf by a trustee is binding on her, *Clark v. Clark*, 10 P. Div. 188.

(*o*) *Hope v. Hope* (1857) 8 D. M. G. 731, 745, 26 L. J. Ch. 417.

(*p*) See *Dav. Conv.* 5, pt. 2, 1079.

Minor
points as
to separa-
tion deeds.

in fact present (*q*). In the earlier cases, no doubt, it was supposed that the contract was made valid in substance as well as in form only by the distinct covenants between the husband and the trustee as to indemnity and payment, or rather that these were the only valid parts of the contract. But since *Wilson v. Wilson* (*r*) and *Hunt v. Hunt* such a view is no longer tenable: in Lord Westbury's words "the theory of a deed of separation is that it is a contract between the husband and wife through the intervention of a third party, namely the trustees, and the husband's contract for the benefit of the wife is supported by the contract of the trustees on her behalf" (*s*). A covenant not to sue for restitution of conjugal rights cannot be implied, and in the absence of such a covenant the institution of such a suit does not discharge the other party's obligations under the separation deed (*t*). Subsequent adultery does not of itself avoid a separation deed unless the other party's covenants are expressly qualified to that effect (*u*). A covenant by the husband to pay an annuity to trustees for the wife so long as they shall live apart—or, since the Married Women's Property Act, to the wife herself—remains in force notwithstanding a subsequent dissolution of the marriage on the ground of the wife's adultery (*x*); but it seems it would be void if future adultery were contemplated at the time (*y*). The concealment of past misconduct between the marriage and the separation may render the arrangement voidable, and so may subsequent misconduct, if the circumstances show that the separation

(*q*) *Gibbs v. Harding* (1870) L. R. 5 Ch. 336, 39 L. J. Ch. 374.

(*r*) On the effect of that case see the remarks in the House of Lords in a subsequent appeal as to the frame of the deed, *Wilson v. Wilson* (1854) 5 H. L. C. 40; and by Lord Westbury, 4 D. F. J. 234.

(*s*) 4 D. F. J. 240.

(*t*) *Jee v. Thurlow* (1824) 2 B. & C. 547, 26 R. R. 453.

(*u*) *Ib.*; *Evans v. Carrington* (1860) 2 D. F. J. 481, 30 L. J. Ch. 364.

(*x*) *Charlesworth v. Holt* (1873) L. R. 9 Ex. 38, 43 L. J. Ex. 25; *Sweet v. Sweet* [1895] 1 Q. B. 12, 64 L. J. Q. B. 108.

(*y*) *Fearon v. Earl of Aylesford* (1884) 14 Q. B. Div. 792, 53 L. J. Q. B. 410.

was fraudulently procured with the present intention of obtaining greater facilities for such misconduct (z).

A separation, or the terms of a separation, between husband and wife cannot lawfully be the subject of an agreement for pecuniary consideration between the husband and a third person. But in the case of *Jones v. Waite* (a) it was decided by the Exchequer Chamber and the House of Lords that the husband's execution of a separation deed already drawn up is a good and lawful consideration for a promise by a third person.

A separation deed, as we have above said, is avoided by subsequent reconciliation and cohabitation (b). If it were not so, but could remain suspended in order to be revived in the event of a renewed separation, it might become equivalent to a contract providing for a contingent separation at a future time: and such a contract, as will immediately be seen, is not allowable. However, a substantive and absolute declaration of trust by a third person contained in a separation deed has been held not to be avoided by a reconciliation (c).

As to all agreements or provisions for a future separation, whether post-nuptial (d) or ante-nuptial (e) (f), and whether proceeding from the parties themselves or from another person (f), it remains the rule of law that

Agreements for future separation void.

(z) *Evans v. Carrington*, note (u), and per Cotton L.J. 14 Q. B. D. at p. 795.

(a) (1842) 1 Bing. N. C. 656, in Ex. Ch. 5 Bing. N. C. 341, in H. L. 9 Cl. & F. 101, 50 R. R. 705. In the Ex. Ch. both Lord Abinger and Lord Denman dissented.

(b) See also *Westmeath v. Salisbury* (1831) 5 Bli. N. S. 339, 35 R. R. 54. Questions may arise whether particular terms are part of the agreement for separation, and therefore subject to be so avoided, or are of a permanent and independent nature: see *Nicol v. Nicol* (1886) 31 Ch. Div. 524, 55

L. J. Ch. 437.

(c) *Ruffles v. Alston* (1875) L. R. 19 Eq. 539, 44 L. J. Ch. 388.

(d) *Marquis of Westmeath v. Marchioness of Westmeath* (1820-1) 1 Dow & Cl. 519, 541; *Westmeath v. Salisbury* (1831) 5 Bli. N. S. 339, 35 R. R. 54.

(e) *H. v. W.* (1857) 3 K. & J. 382. Some of the reasons given in this case (at p. 386) cannot since *Hunt v. Hunt* be supported.

(f) *Cartwright v. Cartwright* (1853) 3 D. M. G. 982, 22 L. J. Ch. 841; note that this and the case last cited were after *Wilson v. Wilson*.

they can have no effect. If a husband and wife who have been separated are reconciled, and agree that in case of a future separation the provisions of a former separation deed shall be revived, this agreement is void (*f*). A condition in a marriage settlement varying the disposition of the income in the event of a separation is void (*g*). So is a limitation over (being in substance a forfeiture of the wife's life interest) in the event of her living separate from her husband through any fault of her own: though it might be good, it seems, if the event were limited to misconduct such as would be a ground for divorce or judicial separation (*h*).

Likewise a deed purporting to provide for an immediate separation is void if the separation does not in fact take place: for this shows that an immediate separation was not intended, but the thing was in truth a device to provide for a future separation (*i*). Nor can such a deed be supported as a voluntary settlement (*k*).

Reason of
the dis-
tinction.

The distinction rests on the following ground:—An agreement for an immediate separation is made to meet a state of things which, however undesirable in itself, has in fact become inevitable. Still that state of things is abnormal and not to be contemplated beforehand. "It is forbidden to provide for the possible dissolution of the marriage contract, which the policy of the law is to preserve intact and inviolate" (*l*). Or in other words, to allow validity to provisions for a future separation would be to allow the parties in effect to make the contract of marriage determinable on conditions fixed beforehand by themselves (*m*).

(*f*) See note (*d*), last page.

(*g*) See note (*f*), last page.

(*h*) See note (*e*), last page.

(*i*) *Hindley v. Marquis of Westmeath* (1827) 6 B. & C. 200, 30 R. R. 290; confirmed by *Westmeath v. Salisbury* (1831) 5 Bli. N. S. 339, 395-7, 35 R. R. 54, 55.

(*k*) *Bindley v. Mulloney* (1869) L. R. 7 Eq. 343.

(*l*) 3 K. & J. 382.

(*m*) Agreements between husband and wife contemplating a future judicial separation (*séparation de corps*) are void in French law: *Sirey & Gilbert on Code Nap. art. 1133, no. 55.*

It is a well-established rule that no enforceable right can be acquired by a blasphemous, seditious, or indecent publication, whether in words or in writing, or by any contract in relation thereto (*n*); but it does not really belong to the present head. The ground on which the cases proceed is that the publication is or would be a criminal offence; not merely immoral, but illegal in the strict sense. The criminal law prohibits it as *malum in se*, and the civil law takes it from the criminal law as *malum prohibitum*, and refuses to recognize it as the origin of any right (*o*). Then the decisions in equity profess simply to follow the law by refusing in a doubtful case to give the aid of equitable remedies to alleged legal rights until the existence of the legal right is ascertained (*p*). It would perhaps be difficult to assert as an abstract proposition that a Court administering civil justice might not conceivably pronounce a writing or discourse immoral which yet could not be the subject of criminal proceedings. But we do not know of such a jurisdiction having ever in fact been exercised; and considering the very wide scope of the criminal law in this behalf (*q*), it seems unlikely that there should arise any occasion for it. Some expressions are to be found which look like claims on the part of purely civil Courts to exercise a general moral censorship apart from any reference to the criminal law. But these are overruled by modern authority. At the present day it is not true that "the Court of Chancery has a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion

Immoral publications: Being criminal offences, these are contrary to positive law.

(*n*) A somewhat analogous question is raised by deceptive trade marks. A trade mark likely to deceive the public will not be registered: *Eno v. Dunn* (1890) 15 App. Ca. 252, 63 L. T. 6.

(*o*) *E.g. Stockdale v. Onwhyn* (1826) 5 B. & C. 173, 29 R. R. 207.

(*p*) *Southey v. Sherwood* (1817)

2 Mer. 435; *Lawrence v. Smith* (1822) Jac. 471, 23 R. R. 123. For a full account of the cases see Shortt on the Law relating to Works of Literature and Art, pp. 3-11, 2nd ed. 1884.

(*q*) See Russell on Crimes, Bk. 2, c. 24, and Stephen's Digest of the Criminal Law, artt. 91-95, 161, 172.

or morality," as was once laid down by Lord Macclesfield ; or that "the Lord Chancellor would grant an injunction against the exhibition of a libellous picture," as was laid down by Lord Ellenborough (r). On the whole it seems that for all practical purposes the civil law is determined by and co-extensive with the criminal law in these matters: the question in a given case is not simply whether the publication be immoral, but whether the criminal law would punish it as immoral.

Contracts as to slaves in U. S. held void in some States though lawful when made.

A very curious doctrine of legal morality was started in some of the United States after the abolition of slavery. It was held that the sale of slaves being against natural right could be made valid only by positive law, and that no right of action arising from it could subsist after the determination of that law. The Supreme Court of Louisiana in particular adjudged that contracts for the sale of persons, though made in the State while slavery was lawful, must be treated as void : but the Supreme Court of the U. S. did not hold itself bound by this view on appeal from the Circuit Court, and distinctly refused to adopt it, thinking that neither the Constitutional Amendment of 1865, nor anything that had happened since, avoided a contract good in its inception (s).

C. *Agreements contrary to public policy.*

Of the doctrine of public policy in general.

Before we go through the different classes of agreements which are void as being of mischievous tendency in some one of certain different ways, something must be said on the more general question of the judicial meaning of "public

(r) *Emperor of Austria v. Day & Kossuth* (1861) 3 D. F. J. 217, 238, 30 L. J. Ch. 690. As to blasphemous or quasi-blasphemous publications something like the older view seems to be involved in *Cowan v. Milbourn* (1867) L. R. 2 Ex. 230, 36 L. J. Ex. 124, but see *contra* the summing up

of Lord Coleridge C.J. in *Reg. v. Ramsey & Foote*, 15 Cox, C. C. 231, 484, 489.

(s) *Boyce v. Tabb* (1873) 18 Wallace, 546. Cp. *White v. Hart*, 13 Wall. 646 ; *Osborn v. Nicholson*, *ib.* 654 (1871).

policy.” That question is, in effect, whether it is at the present time open to courts of justice to hold transactions or dispositions of property void simply because in the judgment of the Court it is against the public good that they should be enforced, although the grounds of that judgment may be novel. The general tendency of modern ideas is no doubt against the continuance of such a jurisdiction. On the other hand there is a good deal of modern and even recent authority which makes it difficult to deny its continued existence.

As a matter of history, there seems to be little doubt that the doctrine of public policy, so far as regards its assertion in a general form in modern times, if not its actual origin, arose from wagers being allowed as the foundation of actions at common law. Their validity was assumed without discussion until the judges repented of it too late. Regretting that wagers could be sued on at all (*t*), they were forced to admit that wagering contracts as such were not invalid, but set to work to discourage them so far as they could. This they did by becoming “astute even to an extent bordering upon the ridiculous to find reasons for refusing to enforce them” in particular cases (*u*).

Its extension by anxiety of Courts to discourage wagers, while wagers as such were valid contracts.

Thus a wager on the future amount of hop duty was held void, because it might expose to all the world the amount of the public revenue, and Parliament was the only proper place for the discussion of such matters (*x*). Where one proprietor of carriages for hire in a town had made a bet with another that a particular person would go to the assembly rooms in his carriage, and not the other's, it was thought that the bet was void, as tending to abridge the freedom of one of the public in choosing his own conveyance, and to expose him to “the inconvenience of being impor-

(*t*) *Good v. Elliott* (1790) 3 T. R. 693, 1 R. R. 803, where Buller J. proposed (without success) to hold void all wagers on events in which the parties had no interest.

(*u*) Per Parke B. *Egerton v. Earl Brownlow* (1853) 4 H. L. C. at p. 124; per Williams J. *ib.* 77; per Alderson B. *ib.* 109.

(*x*) *Atherfold v. Beard* (1788) 2 T. R. 610, 1 R. R. 556.

Later
remarks
on these
decisions.
Qu. How
far now
law.

tuned by rival coachmen" (*y*). A wager on the duration of the life of Napoleon was void, because it gave the plaintiff an interest in keeping the king's enemy alive, and also because it gave the defendant an interest in compassing his death by means other than lawful warfare (*z*). This was probably the extreme case, and has been remarked on as of doubtful authority (*a*). But the Judicial Committee held in 1848, on an Indian appeal (the Act 8 & 9 Vict. c. 109, not extending to British India), that a wager on the price of opium at the next Government sale of opium was not illegal (*b*). The common law was thus stated by Lord Campbell in delivering the judgment:—

"I regret to say that we are bound to consider the common law of England to be that an action may be maintained on a wager, although the parties had no previous interest in the question on which it is laid, if it be not against the interests or feelings of third persons, and does not lead to indecent evidence, and is not contrary to public policy. I look with concern and almost with shame on the subterfuges and contrivances and evasions to which judges in England long resorted in struggling against this rule" (*c*).

It may surely be thought doubtful whether decisions so produced and so reflected upon can in our own time be entitled to any regard at all. But it has been said that they establish a distinction of importance between cases where the parties "have a real interest in the matter, and an apparent right to deal with it" and where they "have no interest but what they themselves create by the contract;" that in the former case the agreement is void only if "directly opposed to public welfare," but in the latter "any tendency whatever to public mischief" will

(*y*) *Eltham v. Kingsman* (1818) 1 B. & Ald. 683, 19 R. R. 417: this, however, was not strictly necessary to the decision.

(*z*) *Gilbert v. Sykes* (1812) 16 East, 150, 14 R. R. 327.

(*a*) By Alderson B. in *Egerton v. Earl Brownlow*, 4 H. L. C. 109, and in the Privy Council in the case

next cited, 6 Moo. P. C. 312.

(*b*) By the Indian Contract Act, s. 30, agreements by way of wager are now void, with an exception in favour of prizes for horse-racing of the value of Rs. 500 or upwards.

(*c*) *Ramloll Thackoorseydass v. Soojumnul Dhondmull* (1848) 6 Moo. P. C. 300, 310.

render it void (*d*). It is difficult to accept this distinction, or at any rate to see to what class of contracts other than wagers it applies. In the case of a lease for lives (to take an instance often used) the parties "have no interest but what they themselves create by the contract" in the lives named in the lease: they have not any "apparent right to deal with" the length of the Sovereign's or other illustrious persons' lives as a term of their contract: yet it has never been doubted that the contract is perfectly good.

The leading modern authority on the general doctrine of "public policy" is the great case of *Egerton v. Earl Brownlow* (*e*). By the will of the seventh Earl of Bridgewater a series of life interests (*f*) were limited, subject to provisoes which were generally called conditions, but were really conditional limitations by way of shifting uses upon the preceding estates (*g*). The effect of these was that if the possessor for the time being of the estates did not acquire the title of Marquis or Duke of Bridgewater, or did accept any inferior title, the estates were to go over. The House of Lords held by four to one, in accordance with the opinion of two judges (*h*) against eight (*i*), that the limitations were void as being against public policy.

The whole subject was much discussed in the opinions on both sides. The greater part of the judges insisted on such considerations as the danger of limiting dispositions of property on speculative notions of impolicy (*k*); the vague and unsatisfactory character of a jurisdiction founded on general opinions of political expedience, as distinguished

(*d*) (1853) 4 H. L. C. 148.

(*e*) 4 H. L. C. 1-250.

(*f*) Not estates of freehold with remainder to first and other sons in tail in the usual way, but a chattel interest for 99 years, if the taker should so long live, remainder to the heirs male of his body. See Dav. Conv. 3, pt. 1, 351.

(*g*) See Lord St. Leonards' judgment, 4 H. L. C. at p. 208.

(*h*) Pollock C.B. and Platt B.

(*i*) Crompton, Williams, Cresswell, Talfourd, Wightman, and Erle JJ., Alderson and Parke BB. Coleridge J. thought the limitations good in part only.

(*k*) Crompton J. at p. 68.

Opinions
in House
of Lords.

from a legitimate use of the policy, or rather general intention, of a particular law as the key to its construction, and the confusion of judicial and legislative functions to which the exercise of such a jurisdiction would lead (*l*); and the fallacy of supposing an object unlawful because it might possibly be sought by unlawful means, when no intention to use such means appeared (*m*). On the other hand it was pointed out that these limitations held out "a direct and powerful temptation to the exercise of corrupt means of obtaining the particular dignity" (*n*); that besides this the restraint on accepting any other dignity, even if it did not amount to forbidding a subject to obey the lawful commands of the Sovereign (*o*), tended in possible events to set private interest in opposition to public duty (*p*); and that the provisoes as a whole were fitted to bias the political and public conduct of the persons interested, and introduce improper motives into it (*q*), and also to embarrass the advisers of the Crown, and influence them to recommend the grant of a peerage or of promotion in the peerage for reasons other than merit (*r*). Lord Lyndhurst, Lord Brougham, Lord Truro, and Lord St. Leonards adopted this view. Lord Cranworth dissented, adhering to his opinion in the Court below (*s*), and made the remark (which is certainly difficult to answer) that the Thellusson will, which the Courts had felt bound to uphold, was much more clearly against public policy than this. The fullest reasons on the side of the actual decision are those of Pollock C.B. and Lord St. Leonards. Their

(*l*) Alderson B. 4 H. L. C. at p. 106; Parke B. at p. 123.

(*m*) Williams J. at p. 77; Parke B. at p. 124.

(*n*) Platt B. at p. 99; Lord St. Leonards at p. 232; Lord Brougham at p. 172.

(*o*) On this point the prevailing opinion, on the whole, was that a subject cannot refuse a peerage [cp. 5 Ric. 2, St. 2, c. 4], but can-

not be compelled to accept it by any particular title, or at all events cannot be compelled to accept promotion by any particular new title if he is a peer already.

(*p*) Pollock C.B. at p. 151.

(*q*) Lord Lyndhurst at p. 163.

(*r*) Pollock C.B. and Lord St. Leonards, *supra*.

(*s*) 1 Sim. N. S. 464.

language is very general, and they go far in the direction of claiming an almost unlimited right of deciding cases according to the judge's view of public policy for the time being. Lord St. Leonards mentioned the fluctuations of the decisions on agreements in restraint of trade as showing that rules of common law have been both created and modified by notions of public policy (*t*). He also said that each case was to be decided upon principle, but abstract rules were not to be laid down (*u*). If this means only that the Court is to be guided by recognized principles, but will not and cannot bind itself by verbal definition, and in the application of constant principles must have due regard to any new or special facts, the proposition is correct and important, though by no means confined to this topic; but if it means to say that the Court may lay down new principles of public policy without any warrant even of analogy, it seems unwarranted. But the *ratio decidendi* of the case does not in truth seem to require any of these wide assertions of judicial discretion. The limitations in question were held bad because they amounted in effect to a gift of pecuniary means to be used in obtaining a peerage, and offered a direct temptation to the improper use of such means, and the improper admission of private motives of interest in political conduct: in short, because in the opinion of the Court they had a manifest tendency to the prejudice of good government and the administration of public affairs. But it is perfectly well recognized that transactions which have this character are all alike void, however different in other respects. Such are champerty and maintenance, the compounding of offences, and the sale of offices. The question in the particular case was whether there was an apparent tendency to mischiefs of this kind, or only a remote possibility of inconvenient consequences. The decision did not

Effect of the decision itself: it does not create a new head of "public policy."

(*t*) See as to the variation of the "policy of the law" in general, *Evanturel v. Evanturel* (1874) L. R.

6 P. C. at p. 29, 43 L. J. P. C. 58.

(*u*) At pp. 238-9.

create a new kind of prohibition, but affirmed the substantial likeness of a very peculiar and unexampled disposition of property to other dispositions and transactions already known to belong to a forbidden class.

Egerton v. Earl Brownlow, however, is certainly a cardinal authority for one rule which applies in all cases of "public policy": namely that the tendency of the transaction at the time, not its actual result, must be looked to. It was urged in vain that the will of the seventh Earl of Bridgewater had in fact been in existence for thirty years without producing any visible ill effects (x).

The prevailing modern view is expressed by the following remarks of the late Sir G. Jessel:—

"It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract" (y).

The wide discretion formerly claimed by the judges in the somewhat analogous field of the law of conspiracy has been finally discredited by the House of Lords as well as the Court of Appeal in the *Mogul Steamship Co.'s case* (z).

We now proceed to the several heads of the subject.

a. Public policy as touching external relations of the State.

(a.) First, as to matters concerning the commonwealth in its relations with foreign powers.

"On the principles of the English law it is not com-

(x) Cp. *Da Costa v. Jones* (1778) Cowp. 729. Wager on sex of third person void, as offensive to that person and tending to indecent evidence: notwithstanding it did not appear that the person had made any objection, and the cause

had in fact been tried without any indecent evidence.

(y) *Printing and Numerical Registering Co. v. Sampson* (1875) L. R. 19 Eq. 462, 44 L. J. Ch. 705.

(z) *Mogul Steamship Co. v. M'Gregor, Gow & Co.* [1892] A. C. 25, 61 L. J. Q. B. 295.

petent to any" domiciled British (a) "subject to enter into a contract to do anything which may be detrimental to the interests of his own country" (b).

An agreement may be void for reasons of this kind either when it is for the benefit of an enemy, or when the enforcement of it would be an affront to a friendly State.

As to the first and more important branch of this rule: Trading with enemy.
"It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the licence of the Crown, is illegal" (c).

The case of *Potts v. Bell* (d), decided by the Exchequer Chamber in 1800, is the leading authority on this subject. Potts v. Bell.
The following points were there decided:

It is a principle of the common law (e) that trading with an enemy without licence from the Crown is illegal.

Purchase of goods in an enemy's country during the war is trading with the enemy, though it be not shown that they were actually purchased from an enemy: and an insurance of goods so purchased is void.

As to insurances originally effected in time of peace: "When a British subject insures against captures, the law infers that the contract contains an exception of captures made by the government of his own country" (f). There is no rule of public policy to prevent insurance of a subject of a foreign State against "arrests of all kings, princes, and peoples" from including seizure by that

(a) The rule does not apply to British subjects domiciled abroad: *Bell v. Reid* (1813) 1 M. & S. 726, 14 R. R. 557.

(b) 7 E. & B. 782.

(c) *Esposito v. Bowden* (1857) (in Ex. Ch.) 7 E. & B. 763, 779, 24 L. J. Q. B. 210; *Kershaw v. Kelsey*, 100 Mass. 561.

(d) (1800) 8 T. R. 548, 5 R. R. 452.

(e) In the Admiralty it was already beyond question: see the series of precedents cited in *Potts v. Bell*.

(f) *Furtado v. Rodgers* (1802) 3 B. & P. 191, 200, 6 R. R. 752; *Ex parte Lee* (1806) 13 Ves. 64.

State before, though shortly before, the outbreak of war with Great Britain, where the policy is sued on after the war is over (*g*).

Effect of
war on
subsisting
contracts.

The effect of the outbreak of war upon subsisting contracts between subjects of the hostile states varies according to the nature of the case. It may be that the contract can be lawfully performed by reason of the belligerent governments or one of them having waived their strict rights: and in such case it remains valid. In *Clementson v. Blessig* (*h*) goods had been ordered of the plaintiff in England by a firm at Odessa before the declaration of war with Russia. By an Order in Council six weeks were given after the declaration of war for Russian merchant vessels to load and depart, and the plaintiff forwarded the goods for shipment in time to be lawfully shipped under this order: it was held that the sale remained good.

If the contract cannot at once be lawfully performed, then it is suspended during hostilities (*i*) unless the nature or objects of the contract be inconsistent with a suspension, in which case "the effect is to dissolve the contract and to absolve both parties from further performance of it" (*k*). The outbreak of a war dissolves a partnership previously existing between subjects of the two hostile countries (*l*).

(*g*) *Driefontein Consolidated Gold Mines v. Janson* [1901] 2 K. B. 419, 70 L. J. K. B. 881, C. A., diss. Vaughan Williams, L.J.

(*h*) (1855) 11 Ex. 135, and on the subject generally see the reporters' note, pp. 141-5.

(*i*) *Ex parte Boussmaker* (1806) 13 Ves. 71, 9 R. R. 142.

(*k*) *Esposito v. Bowden* (1857) 7 E. & B. 763, 783, 27 L. J. Q. B. 17 (in Ex. Ch.) revg. s. c. 4 E. & B. 963, 24 L. J. Q. B. 210. For a later application of the same reason of convenience, cp. *Geipel v. Smith* (1872) L. R. 7 Q. B. 404, 41 L. J. Q. B. 153. A contract to carry

goods has been held to be only suspended by a temporary embargo, though it lasted two years: *Hadley v. Clarke* (1799) 8 T. R. 259, 4 R. R. 641. *Sed qu.* is not this virtually overruled by *Esposito v. Bowden*?

(*l*) *Griswold v. Waddington* (1818) 15 Johns. (Sup. Ct. N. Y.) 57, in error 16 *ib.* 438. In *New York Life Insurance Co. v. Statham* (1876) 93 U. S. 24, a curious question arose as to the effect of the Civil War on life policies effected by residents in the Southern States with a company in the North. It was held by the majority of the Court that, the premiums having

In *Esposito v. Bowden* (k), a neutral ship was chartered to proceed to Odessa, and there load a cargo for an English freighter, and before the ship arrived there war had broken out between England and Russia, and continued till after the time when the loading should have taken place: here the contract could not be performed without trading with the enemy, and in such a case it is convenient that it should be dissolved at once, so that the parties need not wait indefinitely for the mere chance of the war coming to an end, or its otherwise becoming possible to perform the contract lawfully.

Questions have arisen on the validity of bills of exchange drawn on England in a hostile country in time of war. Here the substance of the transaction has to be looked at, not merely the nationality of the persons who are ultimately parties to an action on the bill. Where a bill was drawn on England by an English prisoner in a hostile country, this was held a lawful contract, being made between English subjects; and by the necessity of the case an indorsement to an alien enemy was further held good, so that he might well sue on it after the return of peace (m). But a bill drawn by an alien enemy on a domiciled British subject, and indorsed to a British subject residing in the enemy's country, was held to give no right of action even after the end of the war: for this was a direct trading with the enemy on the part of the acceptor (n). It seems proper to observe that these cases must be carefully distinguished from those which relate only to the personal disability of an alien enemy to sue in our Courts during the war (o).

Bills of exchange between England and hostile country.

been unpaid during the war, the policies were avoided; but that in the circumstances the assured were entitled to the surrender value of their policies at the date of the first default. But the opinions that the contract was avoided without compensation, and that it revived at the end of the war, also found support.

(k) See note (k) last page.

(m) *Antoine v. Morshead* (1815) 6 Taunt. 237, 16 R. R. 610; cp. *Daubuz v. Morshead* (1815) *ib.* 332, 16 R. R. 623.

(n) *Willison v. Patteson* (1817) 7 Taunt. 439, 18 R. R. 525. The circumstances of the indorsement seem immaterial.

(o) Such are *McConnell v. Hector*

Hostilities
against
friendly
nation
cannot be
subject of
lawful
contract.

On the other hand, an agreement cannot be enforced in England which has for its object the conduct of hostilities against a power at peace with the English government, at all events by rebellious subjects of that power who are endeavouring to establish their independence, but have not yet been recognised as independent by England. This was laid down in cases arising out of loans contracted in this country on behalf of some of the South American Republics before they had been officially recognized.

“It is contrary to the law of nations, which in all cases of international law is adopted into the municipal code of every civilized country, for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own in hostilities against their government, and no right of action can arise out of such a transaction” (*p*).

The Supreme Court of the United States has held, however, that an assignment of shares in a company originally formed for a purpose of this kind was so remotely connected with the original illegality of the loan as not to be invalid between the parties to it (*q*).

Neutral
trade with
bellige-
rents is at
risk of
capture
only, not
unlawful.

It is not a “municipal offence by the law of nations” for citizens of a neutral country to carry on trade with a blockaded port—that is, the courts of their own country cannot be expected to treat it as illegal (though of course it is done at the risk of seizure, of which seizure, if made, the neutral trader or his government cannot complain): and agreements having such trade for their object—*e.g.* a joint adventure in blockade running—are accordingly valid and enforceable in the courts of the neutral state (*r*).

3 B. & P. 113, 6 R. R. 724; *Brandon v. Nesbitt* (1794) 6 T. R. 23, 3 R. R. 109. As to prisoners of war here, *Sparenburgh v. Bannatyne* (1797) 1 B. & P. 163, 4 R. R. 772.

(*p*) Best C.J. *De Wütz v. Hendricks* (1824) 2 Bing. 314, 27 R. R. 660. Cp. *Thompson v. Powles* (1828) 2 Sim. 194, where the language

seems unnecessarily wide.

(*q*) *McBlair v. Gibbes* (1854) 17 Howard, 232.

(*r*) *Ex parte Chavasse* (1865) 4 D. J. S. 655, see Lord Westbury’s judgment: *The Helen* (1875) L. R. 1 Ad. & Ecc. 1, 34 L. J. Ad. 2, and American authorities there cited; Kent, Comm. 3, 267.

There were decisions on this topic of aiding or trading with enemies in the American Supreme Court in cases arising out of the Civil War (s).

It is admitted as a thing required by the comity of nations that an agreement to contravene the laws of a foreign country would in general be unlawful. But it is said that revenue laws (in practice the most important cases) are excepted, and that "no country ever takes notice of the revenue laws of another" (t). Excep-
tional
treatment
of foreign
revenue
laws.

As a general proposition, however, this is disapproved by most modern writers as contrary to reason and justice (u). It should be noted that our Courts, so far as they have acted upon it, have done so to the prejudice of our own revenue quite as much as to that of foreign states. Thus a complete sale of goods abroad by a foreign vendor is valid, and the price may be recovered in an English Court, though he knew of the buyer's intention to smuggle the goods into England. "The subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this" (x). But it is admitted that an agreement to be performed in England in violation of English revenue laws would be void—as if, for example, the goods were to be smuggled by the seller and so delivered in England. And a subject, domiciled in the British dominions (though not in England or within the operation of English revenue laws) cannot recover in an English Court the price of goods sold by him to be smuggled into England (y); and even a foreign vendor cannot recover

(s) See *Texas v. White* (1868) 7 Wallace, 700 (where, however, the chief points are of constitutional law); *Hanauer v. Doane* (1870) 12 *ib.* 342. *Sprott v. U. S.* (1874) 20 Wall. 459, goes beyond anything in our books, and the dissent of Field J. seems well founded.

(t) Lord Mansfield in *Holman v. Johnson* (1775) 1 Cowp. 341.

(u) *E.g.* Kent, Comm. 3, 263-266;

Dicey, Conflict of Laws, 562.

(x) *Holman v. Johnson* (1775) 1 Cowp. 341; *Pellecat v. Angell* (1835) 2 C. M. & R. 311-3, 41 R. R. 723, per Lord Abinger C.B.

(y) *Clugas v. Penaluna* (1791) 4 T. R. 466, 2 R. R. 442. It seems, but it is not quite certain, from this case, that mere knowledge of the buyer's intention would disentitle him.

if he has himself actively contributed to the breach of English revenue laws, as by packing the goods in a manner suitable and to his knowledge intended for the purpose of smuggling (z).

The cases upholding contracts of this kind, whether as against our own or as against foreign laws, would probably not be now extended beyond the points specifically decided by them, and perhaps not altogether upheld (a). There is one modern case which looks at first sight like an authority for saying that our Courts pay no regard to foreign shipping registration laws: but it really goes upon a different principle, and, besides, the law of the United States was not properly brought before the Court (b).

Foreign
stamp
laws.

As to instruments which cannot be used in their own country for want of a stamp, it is now settled that regard will be paid by the Courts of other States to the law which regulates them, and the only question is as to the real effect of that law. If it is a mere rule of local procedure, requiring the stamp to make the instrument admissible in evidence, a foreign Court, not being bound by such rules of procedure, will not reject the instrument as evidence: it is otherwise if the local law "makes a stamp necessary to the validity of the instrument," *i.e.* a condition precedent to its having any legal effect at all (c).

b. Public
policy as
touching
internal
govern-
ment.

Corrupt or
improper
influence

(b.) As to matters touching good government and the administration of justice.

It is needless to produce authorities to show that an agreement whose object is to induce any officer of the State, whether judicial or executive, to act partially or

(z) *Waymell v. Reed* (1794) 5 T. R. 599, 2 R. R. 675.

(a) It must be remembered that the general law as to sale of goods, &c., which the seller knows will be used for an unlawful purpose, was not fully settled at the date of these

authorities.

(b) *Sharp v. Taylor* (1849) 2 Ph. 801, see *Lindley on Partnership*, 115.

(c) See *Dicey, Conflict of Laws*, 716, 717; *Bristow v. Secqueville* (1850) 5 Ex. 275, 19 L. J. Ex. 289.

corruptly in his office, must in any civilized country be void. But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void. The case of *Egerton v. Earl Brownlow*, of which an account has been given a few pages above, was decided on the principle that all transactions are void which create contingent interests of a nature to put the pressure of extraneous and improper motives upon the counsels of the Crown or the political conduct of legislators.

A decision in the American Supreme Court which happens to be of nearly the same date shows that an agreement is void which contemplates the use of underhand means to influence legislation. In *Marshall v. Baltimore and Ohio Railroad Co.* (*d*) the nature of the agreement sued on appeared by a letter from the plaintiff to the president of the railway board, in which he proposed a plan for obtaining a right of way through Virginia for the company and offered himself as agent for the purpose. The letter pointed (though not in express terms) to the use of secret influence on particular members of the legislature: and it referred to an accompanying document which explained the nature of the plan in more detail. This document contained the following passage:—"I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the legislature with respectable agents, whose persuasive arguments may influence the members to do you a naked justice. This is all I require—secrecy from motives of policy alone—because an open agency would furnish ground of suspicion and unmerited invective, and might weaken the impression we seek to make." The arrangement was to be as secret as practicable: the company was to have but one ostensible agent, who was to choose such

on public
officers or
legis-
lature.

Marshall
v. Balti-
more, &c.,
Co.
(Sup.
Court
U. S.)

(*d*) (1853) 16 Howard, 314.

and so many sub-agents as he thought proper: and the payment was to be contingent on success. The actual contract was made by a resolution of the directors, according to which agents were to be employed to "superintend and further" the contemplated application to the legislature of Virginia "and to take all proper measures for that purpose;" and their right to any compensation was to be contingent on the passing of the law. The Supreme Court held, first, that it was sufficiently clear that the contract was in fact made on the footing of the previous communications, and was to be carried out in the manner there proposed; and secondly, that being so made it was against public policy and void.

"It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty. Public policy and sound morality do therefore imperatively require that Courts should put the stamp of their disapprobation on every act and pronounce void every contract the ultimate [*qu.* immediate?] or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." [The judgment then points out that persons interested in the results of pending legislation have a right to urge their claims either in person or by agents, but in the latter case the agency must be open and acknowledged.] "Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind, have all the effects of a direct fraud on the public" (*e*).

And the result of the previous authorities was stated to be—

"1st. That all contracts for a contingent compensation for obtaining legislation, or to use personal or any secret or sinister influence on legislators are (*f*) void by the policy of the law.

"2nd. Secrecy as to the character under which the agent or solicitor acts tends to deception and is immoral and fraudulent, and where the

(*e*) (1853) 16 Howard, at pp. 334-5.

(*f*) "*Is*" by a clerical error in the report.

agent contracts to use secret influences, or voluntarily without contract with his principal uses such means, he cannot have the assistance of a Court to recover compensation.

“3rd. That what in the technical vocabulary of politicians is termed ‘log-rolling’ (g) is a misdemeanour at common law punishable by indictment” (h).

So in a later case (i) an agreement to prosecute a claim before Congress by means of personal influence and solicitations of the kind known as “lobby service” has been held void.

But as it is open to a landowner or other interested person to defend his interest by all lawful means against proposed legislation from which he apprehends injury, so it is open to him to withdraw or compromise his claims on any terms he thinks fit. There is no reason against bargains of this kind any more than against a compromise of disputed civil rights in ordinary litigation. And the lawfulness of such an agreement is not altered if it so happens that the party is himself a member of the legislature. In the absence of anything to show the contrary, he is presumed to make the agreement solely in his character of a person having a valuable interest of his own in the matter, and he is not to be deprived of his rights in that character merely because he is also a legislator (k). “A landowner cannot be restricted of his rights because he happens to be a member of Parliament” (l). This may seem anomalous: but it must be remembered that in practice there is little chance of a conflict between duty and interest, as the legislature generally informs itself on these matters by means of committees proceeding in a quasi-judicial manner. Of course it would be improper for a member personally interested to sit on such a committee.

Otherwise of contract by person interested to withdraw opposition; *Simpson v. Lord Howden*.

(g) Arrangements between members for the barter of votes on private bills.

(h) 16 Howard, 336.

(i) *Trist v. Child* (1874) 21 Wall. 441. See, too, *Meguire v. Corwine* (1879) 101 U. S. 108.

(k) *Simpson v. Lord Howden* (1839-42) 2 P. & D. 714, 10 A. & E. 793, 9 Cl. & F. 61, 50 R. R. 555.

(l) *Kindersley V.-C. in Earl of Shrewsbury v. N. Staffordshire Ry. Co.* (1865) L. R. 1 Eq. 593, 613, 35 L. J. Ch. 156.

Sale of
offices,
&c., at
common
law.

On similar grounds it is said that the sale of offices (which is forbidden by statutes extending to almost every case) is also void at common law (*m*). However, there may be a lawful partnership in the emoluments of offices, although a sale of the offices themselves or a complete assignment of the emoluments would be unlawful (*n*). The same principles are applied to other appointments which though not exactly public offices are concerned with matters of public interest. "Public policy requires that there shall be no money consideration for the appointment to an office in which the public are interested: the public will be better served by having persons best qualified to fill offices appointed to them; but if money may be given to those who appoint, it may be a temptation to them to appoint improper persons." Therefore the practice which had grown up in the last century of purchasing commands of ships in the East India Company's service was held unlawful, no less on this ground than because it was against the Company's regulations (*o*).

In like manner a secret agreement to hand over to another person the profits of a contract made for the public service, such as a Post Office contract for the conveyance of mails, is void (*p*).

Nevertheless many particular offices, and notably subordinate offices in the courts of justice, were in fact saleable and the subject of sale by custom or otherwise until quite modern times. But the commission of an officer in the army could not be the subject of a valid pledge even under the old system of purchase (*q*).

Assign-
ments of
salaries.

For like reasons certain assignments of salaries and pensions have been held void, as tending to defeat the public objects for which the original grant was intended. Thus

(*m*) *Hanington v. Du Chastel* (1781) 2 Swanst. 159, *n.*; *Hopkins v. Prescott* (1847) 4 C. B. 578, 16 L. J. C. P. 259, per Coltman J.

(*n*) *Sterry v. Clifton* (1850) 9 C. B. 110, 19 L. J. C. P. 237.

(*o*) *Blachford v. Preston* (1799) 8 T. R. 89, 93, 4 R. R. 598.

(*p*) *Osborne v. Williams* (1811) 18 Ves. 379, 11 R. R. 218.

(*q*) *Collyer v. Fallon* (1823) T. & R. 459.

military pay and judicial salaries are not assignable. The rule is that "a pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable": and therefore a pension given not only as a reward for past services, but for the support of a dignity created at the same time and for the same reason, is inalienable (*r*). But an assignment by the holder of a public office of a sum equivalent to a proportionate part of salary, and secured to his legal personal representatives on his death by the terms of his appointment, is not invalid, such a sum being simply a part of his personal estate like money secured by life insurance (*s*). A clergyman having cure of souls is not, as such, a public officer for the purpose of this rule (*t*). A mortgage by an officer of the Customs of his disposable share in the "Customs Annuity and Benevolent Fund" created by a special Act has been unsuccessfully disputed as contrary to the policy of the Act (*u*).

Agreements for the purpose of "stifling a criminal prosecution" are void as tending to obstruct the course of public justice. An agreement made in consideration ostensibly of the giving up of certain promissory notes, the notes in fact having forged indorsements upon them, and the real consideration appearing by the circumstances to be the forbearance of the other party to prosecute, was held void on this ground in the House of Lords. The principle of the law as there laid down by Lord Westbury is "That you shall not make a trade of a felony" (*x*).

Interference with course of justice. In criminal proceedings. "Stifling prosecutions." Williams v. Bayley.

However the principal direct authority must still be Keir v. Leeman.

(*r*) *Davis v. Duke of Marlborough* (1818) 1 Swanst. 74, 79, 53 R. R. 29, 31. Cp. *Arbuthnot v. Norton* (1846) 5 Moo. P. C. 219. And see authorities collected in the notes to *Ryall v. Rowles* (1749) in 2 Wh. & T. L. C.

(*s*) *Arbuthnot v. Norton* (1846) 5

Moo. P. C. 219.

(*t*) *Re Mirams* [1891] 1 Q. B. 594, 60 L. J. Q. B. 397.

(*u*) *Macleane's trusts* (1874) L. R. 19 Eq. 274.

(*x*) *Williams v. Bayley* (1866) L. R. 1 H. L. 200, 220, 35 L. J. Ch. 717.

sought in the earlier case of *Keir v. Leeman* (y). The Court of Queen's Bench there said:—

“The principle of law is laid down by Wilmot C.J. in *Collins v. Blantern* (z) that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused is founded on an unlawful consideration and void. On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. [The cases are then reviewed.] We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature no agreement can be valid that is founded on the consideration of stifling a prosecution for it” (a).

Accordingly the Court held that an indictment for offences including riot and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise. The judgment of the Exchequer Chamber (b) affirmed this, but showed some dissatisfaction even with the limited right of compromise admitted in the Court below. The Court of Appeal has since held that the compromise of any public misdemeanour, from whatever motive, is illegal (c), though where there is a choice of a civil or criminal remedy a compromise of criminal as well as civil proceedings may be lawful (d).

There need not be an express agreement not to prosecute. An understanding to that effect, shown by the circumstances to be part of the transaction, will be enough.

(y) (1844) 6 Q. B. 308, 13 L. J. Q. B. 259, in Ex. Ch. 9 Q. B. 371, 15 L. J. Q. B. 360.

(z) 1 Sm. L. C. 369, 382 (355, 365, 10th ed.).

(a) Acc. in *Clubb v. Hutson* (1865) 18 C. B. N. S. 414, held that forbearance to prosecute a charge of obtaining money by false pretences is an illegal consideration. What if there is no real ground for a prosecution, the supposed offence

being an act not criminally punishable? See per Fry J. 8 Ch. D. at p. 477. It is submitted that the agreement would be void for want of consideration.

(b) 9 Q. B. at p. 392.

(c) *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 351, 59 L. J. Ch. 608.

(d) *Fisher & Co. v. Apollinaris Co.* (1875) 10 Ch. 297, 44 L. J. Ch. 500.

And, since the defence of illegality in cases of this kind is allowed on public grounds, it must be allowed even if the Court thinks it discreditable to the party setting it up (*e*).

It is not compounding felony for a person whose name has been forged to a bill to adopt the forged signature and advance money to the forger to enable him to take up the bill. It is doubtful whether a security given by the forger for such advance is valid: but he cannot himself actively dispute it (on the principle *potior est conditio defendentis*, of which afterwards), nor can his trustee in bankruptcy, who for this purpose is in no better position than himself, as there is in any case no offence against the bankrupt laws (*f*).

An agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail (*g*): and so is the like agreement of a third person (*h*).

The compounding of offences under penal statutes is expressly forbidden by 18 Eliz. c. 5, s. 5. 18 Eliz. c. 5.

An election petition, though not a criminal proceeding, is a proceeding of a public character and interest which may have penal consequences; and an agreement for pecuniary consideration not to proceed with an election petition is void at common law, as its effect would be to deprive the public of the benefit which would result from the investigation (*i*). Compromise of election petition.

In like manner an agreement for the collusive conduct of a divorce suit is void (*k*), and agreements not to expose

(*e*) *Jones v. Merionethshire Building Society* [1892] 1 Ch. 173, 61 L. J. Ch. 138, C. A.

(*f*) Otherwise where, after an act of bankruptcy, the bankrupt's money has been paid for stifling a prosecution: there the trustee can recover it: *Ex parte Wolverhampton Banking Co.* (1884) 14 Q. B. D. 32; *Ex parte Caldecott* (1876) 4 Ch. Div. 150, 46 L. J. Bk. 14.

(*g*) *Herman v. Jeuchner* (1885) 15 Q. B. Div. 561, 54 L. J. Q. B. 340.

(*h*) *Consolidated Exploration and Finance Co. v. Musgrave* [1900] 1 Ch. 37, 69 L. J. Ch. 11.

(*i*) *Coppock v. Bower* (1838) 4 M. & W. 361, 51 R. R. 627.

(*k*) *Hope v. Hope* (1857) 8 D. M. G. 731, 26 L. J. Ch. 417.

immoral conduct (*l*), and to conduct criminal proceedings against a third person in such a way that the name of a party who was in fact involved in the transaction should not be mentioned (*m*) have been held void as against public policy.

Secret agreement as to conduct of winding-up: *Elliott v. Richardson*.

A shareholder in a company which was in course of compulsory winding-up agreed with other shareholders, who were also creditors, in consideration of being indemnified by them against all future calls on his shares, that he would help them to get an expected call postponed and also support their claim; it was held that "such an agreement amounts to an interference with the course of public justice": for the clear intention of the Winding-up Acts is that the proceedings should be taken with reasonable speed so that the company's affairs may be settled and the shareholders relieved; and therefore any secret agreement to delay proceedings to the prejudice of the other shareholders and creditors is void (*n*). This comes near to the cases of secret agreements with particular creditors in bankruptcy or composition: and those cases do in fact rest partly on this ground. But the direct fraud on the other creditors is the chief element in them, and we have therefore spoken of them under an earlier head (p. 279).

Agreements for reference to arbitration, how far valid at common law.

Agreements to refer disputes to arbitration are, or rather were, to a certain extent regarded as encroachments on the proper authority of courts of justice by the substitution of a "domestic forum" of the parties' own making. At common law such an agreement, though so far valid that an action can be maintained for a breach of it (*o*), does not "oust the ordinary jurisdiction of the Court"—that is, cannot be set up as a bar to an action brought in

(*l*) *Brown v. Brine* (1875) 1 Ex. D. 5, 45 L. J. Ex. 129.

(*m*) *Lound v. Grimwade* (1888) 39 Ch. D. 605, 57 L. J. Ch. 725.

(*n*) *Elliott v. Richardson* (1870) L. R. 5 C. P. 744, 748-9, per Willes J. 39 L. J. C. P. 340.

(*o*) *Livingston v. Ralli* (1855) 5 E. & B. 132, 24 L. J. Q. B. 269.

the ordinary way to determine the very dispute which it was agreed to refer. Nor could such an agreement be specifically enforced (*p*), or used as a bar to a suit in equity (*q*). It is said however "that a special covenant not to sue *may* make a difference" (*q*). And the law has not been directly altered (*q*); but the Common Law Procedure Act, 1854, now superseded by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), gave the Courts a discretion to stay proceedings in actions or suits on the subject-matter of an agreement to refer, which amounts in practice to enabling them to enforce the agreement: and this discretion has as a rule been exercised by Courts both of law (*r*) and of equity (*s*) in the absence of special circumstances, such as a case where a charge of fraud is made, and the party charged with it desires the inquiry to be public (*t*), or where the defendant appeals to an arbitration clause not in good faith, but merely for the sake of vexation or delay (*u*), or is otherwise not really ready and willing to arbitrate (*x*). A question whether on the true construction of an arbitration clause the subject-matter of a particular dispute falls within it is itself to be dealt with by the arbitrator, if it appears from the nature of the case and the terms of the provisions for arbitration that such was

Practically enforceable under Arbitration Act.

(*p*) *Street v. Rigby* (1802) 6 Ves. 815, 818.

(*q*) *Cooke v. Cooke* (1867) L. R. 4 Eq. 77, 86-7, 30 L. J. Ch. 480. By Scots law a reference excludes the jurisdiction only if it is to named arbitrators, see *Hamlyn & Co. v. Talisker Distillery* [1894] A. C. 202.

(*r*) *Randegger v. Holmes* (1866) L. R. 1 C. P. 679; *Seligmann v. Le Boutillier* (1866) *ib.* 681.

(*s*) *Willesford v. Watson* (1873) L. R. 14 Eq. 572, 8 Ch. 473, 42 L. J. Ch. 447; *Plews v. Baker* (1873) L. R. 16 Eq. 564, 43 L. J. Ch. 212.

(*t*) *Russell v. Russell* (1880) 14 Ch. D. at p. 476 (Jessel M.R.).

(*u*) L. R. 14 Eq. 578; *Witt v. Corcoran* (1871) L. R. 8 Ch. 476, *n.*,

L. R. 16 Eq. 571. The enactment applies only where there is at the time of action brought an existing agreement for reference which can be carried into effect: *Randell, Saunders & Co. v. Thompson* (1876) 1 Q. B. Div. 748, 45 L. J. Q. B. 713. Not where the arbitration clause does not cover the whole subject-matter: *Turnock v. Sartoris* (1889) 43 Ch. Div. 150, 62 L. T. 209. Nor when the matter in difference is a question of pure law: *Clegg v. Clegg* (1890) 44 Ch. Div. 200, 59 L. J. Ch. 520.

(*x*) See the principle and limits of the exception explained in the C. A.: *Parry v. Liverpool Malt Co.* [1900] 1 Q. B. 339, 69 L. J. Q. B. 161.

the intention of the parties. Otherwise it must be decided by the Court (*y*).

And when the question is whether an agreement containing an arbitration clause is or is not determined, that question is not one for arbitration, since the arbitration clause itself must stand or fall with the whole agreement (*z*).

Special
statutory
arbitration
clauses.

Certain statutory provisions for the reference to arbitration of internal disputes in friendly and building societies have been decided (after some conflict) to be compulsory and to exclude the ordinary jurisdiction of the Courts (*a*). The Railway Companies Arbitration Act, 1859, is also compulsory (*b*).

Agree-
ment of
parties
may make
right of
action
conditional
on arbitra-
tion.

Moreover parties may if they choose make arbitration a condition precedent to any right arising at all, and in that case the foregoing rules are inapplicable: as where the contract is to pay such an amount as shall be determined by arbitration or found due by the certificate of a particular person (*c*). Whether this is in fact the contract, or it is an absolute contract to pay in the first instance, with a collateral provision for reference in case of difference

(*y*) *Piercy v. Young* (1879) 14 Ch. Div. 200, 208, per Jessel M.R. qualifying the apparent effect of *Willesford v. Watson* (1873) L. R. 8 Ch. 473.

(*z*) Per James L.J. in *Llanelly Ry. & Dock Co. v. L. & N. W. Ry. Co.* (1873) L. R. 8 Ch. at p. 948.

(*a*) *Wright v. Monarch Investment Building Society* (1877) 5 Ch. D. 726, 46 L. J. Ch. 649; *Hack v. London Provident Building Society* (1883) 23 Ch. Div. 103, 52 L. J. Ch. 542; *Municipal Building Society v. Kent* (1884) 9 App. Ca. 260, 53 L. J. Q. B. 290; *Bache v. Billingham* [1894] 1 Q. B. 107, 63 L. J. M. C. 1, C. A. (an improper award, otherwise within the Act, cannot be treated as a mere nullity). Not so where the real question is whether a party claiming against the society

is a member of the society at all: *Prentice v. London* (1875) L. R. 10 C. P. 679, 44 L. J. C. P. 353. See the Building Societies Act, 1884, 47 & 48 Vict. c. 41, and *Western Suburban, &c. Co. v. Martin* (1886) 17 Q. B. Div. 609, 55 L. J. Q. B. 382.

(*b*) *Watford & Rickmansworth Ry. Co. v. L. & N. W. Ry. Co.* (1869) L. R. 8 Eq. 231, 38 L. J. Ch. 449.

(*c*) *Scott v. Avery* (1855-6) 5 H. L. C. 811, 25 L. J. Ex. 303, which does not overrule the former general law on the subject, see the judgments of Brett J. and Kelly C.B. in Ex. Ch. in *Edwards v. Aberayron, &c. Society* (1875-6) 1 Q. B. D. 563; *Scott v. Corporation of Liverpool* (1858) 3 De G. & J. 334, 28 L. J. Ch. 236. Cp. *Collins v. Locke* (1879) (J. C.) 4 App. Ca. 674, 689, 48 L. J. P. C. 68.

as to the amount, is a question of construction on which there have been more or less conflicting opinions (*d*).

We now come to a class of transactions which are specially discouraged, as tending to pervert the due course of justice in civil suits. Maintenance and champerty.

These are the dealings which are held void as amounting to or being in the nature of champerty or maintenance. The principle of the law on this head has been defined to be "that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (*e*). Maintenance is properly a general term of which champerty is a species. Their most usual meanings (together with certain additions and distinctions now obsolete) are thus given by Coke:—

"First, to maintain to have part of the land or anything out of the land or part of the debt, or any other thing in plea or suit; and this is called *cambipartia* [*champart*, *campi partitio*], champertie."

The second is "when one maintaineth the one side without having any part of the thing in plea or suit" (*f*). Champerty may accordingly be described as "maintenance aggravated by an agreement to have a part of the thing in dispute" (*g*).

Agreements falling distinctly within these descriptions are punishable under certain statutes (*h*). It has always been considered, however, that champerty and maintenance

(*d*) *Elliott v. Royal Exchange Assurance Co.* (1867) L. R. 2 Ex. 237, 36 L. J. Ex. 129; *Dawson v. Fitzgerald* (1876) 1 Ex. Div. 257, revg. s. c. L. R. 9 Ex. 7, 45 L. J. Ex. 893.

(*e*) By Lord Abinger in *Prosser v. Edmonds* (1835) 1 Y. & C. Ex. 481, 497, 41 R. R. 322, 334.

(*f*) Co. Lit. 368 *b*. Every champerty is maintenance, 2 Ro. Ab.

119 R.

(*g*) *Bovill, arg. in Sprye v. Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64.

(*h*) 3 Ed. 1 (Stat. Westm. 1), c. 25; 13 Ed. 1 (Stat. Westm. 2), c. 49; 28 Ed. 1, st. 1, c. 11; Stat. de Conspiratoribus, temp. incert; 20 Ed. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; and 32 H. 8, c. 9, of which more presently.

We proceed to deal shortly with these propositions in order.

(α) Agreement to furnish money or evidence for litigation on terms of sharing property recovered is void.

α . This rule was laid down in very clear terms by Tindal C.J. in *Stanley v. Jones* (*t*), which seems to be the first of the modern cases at law.

“A bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons and who at the same time professes to have the means of procuring more evidence, to purchase from one of the contending parties, at the price of the evidence which he so possesses or can procure, a share of the sum of money which shall be recovered by means of the production of that very evidence, cannot be enforced in a Court of law.”

It is quite immaterial for this purpose whether any litigation is already pending or not, although the *offence* of maintenance is properly maintaining an existing suit, not procuring one to be commenced. It is obvious that the mischief is even greater in the case where a person is instigated by the promise of indemnity in the event of failure to undertake litigation which otherwise he would have not thought of. If a person who is in actual possession of certain definite evidences of title proposes to deliver them to the person whose title they support on the terms of having a certain share of any property that may be recovered by means of these evidences, there being no suit depending, and no stipulation for the commencement of any, this is not unlawful; for litigation is not necessarily contemplated at all, and in any case there is no provision for maintaining any litigation there may be (*u*). But it is in vain to put the agreement in such a form if these terms are only colourable (α), and the real agreement is to supply evidence

Verbal evasions ineffectual.

& K. 590, 39 R. R. 304; *De Houghton v. Money* (1866) L. R. 2 Ch. 164; *Seear v. Lawson* (1880) 15 Ch. D. 426, 49 L. J. Bk. 69, where the precise extent of the doctrine is treated as doubtful; *Guy v. Churchill* (1888) 40 Ch. D. 481, 58 L. J. Ch. 345.

(*t*) (1831) 7 Bing. 369, 377, 33 R. R. 513, 520.

(*u*) *Sprye v. Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64.

(α) As a matter of fact, it is difficult to suppose that they could ever be otherwise.

generally for the maintenance of an intended suit: the illegal intention may be shown, and the transaction will be held void (*y*). Still less can the law be evaded by slighter variations in the form or manner of the transaction: for instance, an agreement between solicitor and client that the solicitor shall advance funds for carrying on a suit to recover possession of an estate, and in the event of success shall receive a sum above his regular costs "according to the interest and benefit" acquired by the possession of the estate, is as much void as a bargain for a specific part of the property (*z*). So where a solicitor was to have a percentage of the fund recovered in a suit, it was held to be not the less champerty because he was not himself (and in fact could not be) the solicitor in the suit, but employed another (*a*). A solicitor cannot refuse to account to his client and submit to taxation of his costs on the ground that the business for which he was retained involved champerty or maintenance (*b*).

An agreement by a solicitor with a client simply to charge nothing for costs in a particular action is not champerty (*c*).

β . This rule came to be laid down in a somewhat curious way. In *Wood v. Downes* (*d*) Lord Eldon set aside a purchase by a solicitor from his client of the *res litigiosa*, partly on the ground of maintenance. But it is to be noted as to this ground that the agreement for sale was in substitution for a previous agreement which clearly amounted, and which the parties had discovered to amount, (β) Solicitor in suit cannot purchase subject-matter of the suit from his client. This rule anomalous.

(*y*) *Sprye v. Porter* (1856) 7 E. & B. 58, 26 L. J. Q. B. 64; cp. *Rees v. De Bernardy* [1896] 2 Ch. 437, 65 L. J. Ch. 656, where there was a deliberate endeavour to conceal the real intention.

(*z*) *Earle v. Hopwood* (1861) 9 C. B. N. S. 566, 30 L. J. C. P. 217.

(*a*) *Strange v. Brennan* (1846) 15 Sim. 346, 2 C. P. Cooper (temp. Cottenham) 1, 15 L. J. Ch. 389.

The agreement was made with a solicitor in Ireland, not being a solicitor of the English Court of Chancery, and the fund to be recovered was in England.

(*b*) *Re Thomas, Jaquess v. Thomas* [1894] 1 Q. B. 747.

(*c*) *Jennings v. Johnson* (1873) L. R. 8 C. P. 425.

(*d*) (1811) 18 Ves. 120, 11 R. R. 160.

to maintenance: and the Court appears to have inferred as a fact that it was all one illegal transaction, and the sale merely colourable (*e*). The other ground, which alone would have been enough, was the presumption of undue influence in such a transaction, arising from the fiduciary relation of solicitor and client (of which we shall speak in a subsequent chapter). The Court of Queen's Bench, however, in *Simpson v. Lamb* (*f*) followed *Wood v. Downes*, as having laid down as a matter of the "policy of the law" the positive rule above stated. In *Anderson v. Radcliffe* (*g*), unanimous judgments in both the Q. B. and the Ex. Ch. added the qualification that a conveyance by way of security for past expenses is nevertheless good. The Court of Exchequer Chamber showed a decided opinion that *Simpson v. Lamb* had gone too far, but without positively disapproving it. In *Knight v. Bowyer*, again, Turner L.J. said: "I am aware of no rule of law which prevents an attorney from purchasing what anybody else is at liberty to purchase, subject, of course, if he purchases from a client, to the consequences of that relation" (*h*). But the case before the Court was not the purchase by a solicitor from his client of the subject-matter of a suit *in which he was solicitor*; *Simpson v. Lamb*, therefore, was only treated as distinguishable (*h*). The case must at present be considered a subsisting authority, but anomalous, and not likely to be at all extended.

(*γ*) Purchase of subject-matter of litigation not in itself unlawful.

γ. As to the purchase of things in litigation in general, the authorities cannot all be reconciled in detail. But the distinction which runs through them all is to this effect. The question in every case is whether the real object be

(*e*) Cp. *Sprye v. Porter*, last page. In *Wood v. Downes* the parties do not seem to have even kept the original and real agreement off the face of the transaction in its ultimate shape. See 18 Ves. p. 123, 11 R. R. 162. It is to be regretted that the reporter did not preserve the full

statement of the facts (18 Ves. p. 122) with which the judgment opened.

(*f*) (1857) 7 E. & B. 84, 20 L. J. Q. B. 121.

(*g*) (1858) E. B. & E. 806, 28 L. J. Q. B. 32, 29 *ib.* 128.

(*h*) (1858) 2 De G. & J. at p. 445.

to acquire an interest in property for the purchaser, or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing that interest: but it is unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident is good (*i*); but the sale of a mere right to sue is bad (*k*). But is unlawful if the real intention is to acquire a mere right to sue.

A man who has conveyed property by a deed voidable in equity retains an interest not only transmissible by descent or devise, but disposable *inter vivos*, without such disposition being champerty. But "the right to complain of a fraud is not a marketable commodity," and an agreement whose real object is the acquisition of such a right cannot be enforced (*l*). In like manner, a creditor of a company may well assign his debt, but he cannot sell as incident to it the right to proceed with a winding-up petition (*m*).

The payment of the price being made contingent on the recovery of the property is probably under any circumstances a sufficient, but is by no means a necessary, condition of the Court being satisfied that the real object is to traffic in litigation. If the purchase is made while a suit is actually pending, the circumstance of the purchaser indemnifying the vendor against costs may be material,

(*i*) *Dickinson v. Burrell* (1866) L. R. 1 Eq. 337, 342, 35 L. J. Ch. 371.

(*k*) *Ib.*; *Prosser v. Edmonds* (1835) 1 Y. & C. Ex. 481, 41 R. R. 322. Dist. *Guy v. Churchill* (1888) 40 Ch. D. 481, 56 L. J. Ch. 670; bankrupt's right of action assigned by the trustee to one creditor (in fact acting for himself and others), who was to keep three-fourths of the proceeds; held

justifiable as a beneficial arrangement for the creditors.

(*l*) *Prosser v. Edmonds*, last note; *De Hoghton v. Money* (1866) L. R. 2 Ch. 164, 169. Cp. *Hill v. Boyle* (1867) L. R. 4 Eq. 260, and *qu.* whether the right to cut down an absolute conveyance to a mortgage be saleable: *Seear v. Lawson* (1880) 15 Ch. Div. 426, 49 L. J. Bk. 69.

(*m*) *Paris Skating Rink Co.* (1877) 5 Ch. Div. 959.

but is not alone enough to show that the bargain is in truth for maintenance (*n*). But the only view which on the whole seems tenable is that it is a question of the real intention to be collected from the facts of each case, for arriving at which few or no positive rules can be laid down.

There is no champerty in an agreement to enable the *bonâ fide* purchaser of an estate to recover for rent due or injuries done to it previously to the purchase (*o*).

Purchase of shares in company with intention to sue company or directors at one's own risk not maintenance.

It has been decided in several modern cases that the purchase of shares in a company for the purpose of instituting a suit at one's own risk to restrain the governing body of the company from acts unwarranted by its constitution cannot be impeached as savouring of maintenance (*p*). It was recognized as long ago as 21 Ed. III., that a purchase of property pending a suit affecting the title to it is not of itself champerty: "If pending a real action a stranger purchases the land of tenant in fee for good consideration and not to maintain the plea, this is no champerty" (*q*).

Stat. 32 H. VIII. c. 9. None shall buy, sell, or bargain for any right in lands unless the seller hath been in possession

The statute 32 H. VIII. c. 9, "Against maintenance and embracery, buying of titles, &c." after reciting the mischiefs of "maintenance embracery champerty subornation of witnesses sinister labour buying of titles and pretended rights of persons not being in possession," and confirming all existing statutes against maintenance, enacts that:

"No person or persons, of what estate degree or condition so ever he or

(*n*) *Harrington v. Long* (1833-4) 2 M. & K. 590, 39 R. R. 304, as corrected by *Knight v. Bowyer*, note (*r*) p. 337, and see *Hunter v. Daniel* (1845) 4 Ha. at p. 430. But the true ground of the case seems the same as in *Prosser v. Edmonds* and *De Hoghton v. Money*, namely, that the real object was to give the purchaser a *locus standi* to set aside a deed for fraud.

(*o*) Per Cur. (Ex. Ch.) *Williams v. Protheroe* (1829) 5 Bing. 309, 314, 30 R. R. 608, 613.

(*p*) See *Bloxam v. Metrop. Ry. Co.* (1868) L. R. 3 Ch. at p. 353.

(*q*) 2 Ro. Ab. 113 B.; Y. B. 21 E. III., 10, pl. 33 [cited as 52 in Rolle]; but in 50 Ass. 323, pl. 3, the general opinion of the Serjeants is *contra*. Cp. 4 Kent, Comm. 449.

they be, shall from henceforth bargain buy or sell, or by any ways or means obtain get or have, any pretended rights or titles, or take promise grant or covenant to have any right or title of any person or persons in or to any manors lands tenements or hereditaments, but if such person or persons which shall so bargain sell give grant covenant or promise the same their antecessors or they by whom he or they claim the same have been in possession of the same or of the reversion or remainder thereof or taken the rents or profits thereof by the space of one whole year next before the said bargain covenant grant or promise made.” or taken the profits for one year.

The penalty is forfeiture of the whole value of the lands (s. 2), saving the right of persons in lawful possession to buy in adverse claims (s. 4). There is no express saving of grants or leases by persons in actual possession who have been so for less than a year: but either the condition as to time applies only to receipt of rents or profits without actual possession, or at all events the intention not to touch the acts of owners in possession is obvious (r). Penalty and saving.

This, like the other statutes against maintenance and champerty, is said to be in affirmance of the common law (s). It “is formed on the view that possession should remain undisturbed. Dealings with property by a person out of possession tend to disturb the actual possession to the injury of the public at large” (t). It is immaterial whether the vendor out of possession has in truth a good title or not (s). An agreement between two persons out of possession of lands, and both claiming title in them, to recover and share the lands, is contrary to the policy of this statute, if not champerty at common law; therefore where co-plaintiffs had in fact conflicting interests, and it Dealings held within the statute. Agreement to recover and divide property.

(r) By Mountague C.J. *Partridge v. Strange*, Plowd. 88, cited in *Doe d. Williams v. Evans* (1845) 1 C. B. 717, *ib.* 89, 14 L. J. C. P. 237. See further *Jenkins v. Jones* (1882) 9 Q. B. Div. 128, 51 L. J. Q. B. 438, as to the meaning of “pretended rights” and the limited application of the statute at the present time. A right or title which is grantable under 8 & 9 Vict. c. 106, is not now “pre-

tended” merely because the grantor has never been in possession. To enforce a forfeiture under the statute the plaintiff must show that the purchaser knew the title to be “pretended”: *Kennedy v. Lyell* (1885) 15 Q. B. D. 491, 53 L. T. 466.

(s) See last note.

(t) Per Lord Redesdale, *Cholmondeley v. Clinton* (1821) 4 Bligh, at p. 75.

was sought to avoid the resulting difficulty as to the frame of the suit by stating an agreement to divide the property in suit between them, this device (which now would in any case be disallowed on more general grounds) (*u*) was unavailing; for such an agreement, had it really existed, would have been unlawful, and would have subjected the parties to the penalties of the statute (*x*).

Sale of term by administrator out of possession.

Secus sale of non-litigious expectancy.

Where after the death of a lessee a stranger had entered, and remained many years in possession, a sale of the term by the administrator of the lessee was held void as contrary to the statute, although in terms it only forbids sales of pretended rights, &c., under penalties, without expressly making them void (*y*). But the sale of a contingent right or a mere expectancy, not being in the nature of a claim adverse to any existing possession, is not forbidden. The sale of a man's possible interest as the devisee of a living owner, on the terms that he shall return the purchase-money if he does not become the devisee, is not bad either at common law as creating an unlawful interest in the present owner's death, or as a bargain for a pretended title under the statute (*z*).

Proceedings in lunacy not

Proceedings in lunacy seem not to be within the general rules as to champerty, as they are not analogous to ordinary

(*u*) See *Cooke v. Cooke* (1864) 4 D. J. S. 704; *Pryse v. Pryse* (1872) L. R. 15 Eq. 86, 42 L. J. Ch. 253.

(*x*) *Cholmondeley v. Clinton* (1821) 4 Bligh, 1, 43, 82, per Lord Eldon and Lord Redesdale.

(*y*) *Doe d. Williams v. Evans* (1845) 1 C. B. 717, 14 L. J. C. P. 237. Cp. above as to the construction of prohibitory statutes in general, p. 296.

(*z*) *Cook v. Field* (1850) 15 Q. B. 460, 19 L. J. Q. B. 441. By the civil law, however, such contracts are regarded as *contra bonos mores*. "Huiusmodi pactiones odiosae videntur et plenae tristissimi et periculosi eventus," we read in a rescript of Justinian on an agree-

ment between expectant co-heirs as to the disposal of the inheritance. The rescript goes on, quite in the spirit of our own statute, to forbid in general terms all dealings "in alienis rebus contra domini voluntatem": C. 2. 3, *de pactis*, 30. By the Code Napoléon, art. 1600 (followed by the Italian Civil Code, art. 1460). "On ne peut vendre la succession d'une personne vivante, même de son consentement:" cp. 791, 1130. In Roman law the rule that the inheritance of a living person could not be sold is put only on the technical ground "quia in rerum natura non sit quod venierit": D. 18. 4. *de hered. vel actione vendita*, 1, and see *eod. tit.* 7-11.

litigation, and their object is the protection of the person and property of the lunatic, which is in itself to be encouraged; and "this object would in many cases be impeded rather than promoted by holding that all agreements relative to the costs of the proceedings or the ultimate division of the property were void" (a).

within the
rules
against
champerty.

As to maintenance in general, maintenance in the strict and proper sense is understood to mean only the maintenance of an existing suit, not procuring the commencement of a new one. But the distinction is in practice immaterial even in the criminal law (b). It is of more importance that a transaction cannot be void for champerty or maintenance unless it be "something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (c). Therefore, for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name (c). Nor is it maintenance for several persons to agree to prosecute or defend a suit in the result of which they have, or reasonably believe they have, a common interest (d). But a bargain to have a share of

Maintenance in general.

(a) *Persse v. Persse* (1840) 7 Cl. & F. 279, 316, 51 R. R. 22, 29, per Lord Cottenham.

(b) See *Wood v. Downes* (1811) 18 Ves. at p. 125, 11 R. R. 164.

(c) *Fischer v. Kamala Naicker* (1860) 8 Moo. Ind. App. 170, 187. This is not necessarily applicable in England, being said with reference to the law of British India, where the English laws against maintenance and champerty are not specifically in force: see *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1876) 2 App. Ca. 186, 207-9, and the later judgment cited below. But it fairly represents the principles on which English judges

have acted in the modern cases. "The English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy; but such documents should be jealously scanned, and, when found to be extortionate and unconscionable, they are inequitable as against the party against whom relief is sought, and effect should not be given to them": *Kunwar Ram Lal v. Nil Kanth* (1893) L. R. 20 Ind. App. 112, 115.

(d) *Findon v. Parker* (1843) 11

property to be recovered in a suit in consideration of maintaining the suit by the supply of money and evidence is not saved from being champerty by the party's having a mere collateral interest in the result of the suit (*e*). Where a person sues for a statutory penalty as a common informer, it is maintenance to indemnify him against costs (*f*).

Certain relations will justify maintenance, but not champerty.

c. Public policy as to legal duties of individuals.

Lineal kinship in the first degree or apparent heirship, and to a certain extent, it seems, any degree of kindred or affinity, or the relation of master and servant, may justify acts which as between strangers would be maintenance: but blood relationship will not justify champerty (*g*).

(*c*) As to matters touching legal (and possibly moral) duties of individuals in the performance of which the public have an interest.

Agreements as to custody or education of children.

Certain kinds of agreements are or have been considered unlawful and void as providing for or tending to the omission of duties which are indeed duties towards individuals, but such that their performance is of public importance. To this head must be referred the rule of law that a father cannot by contract deprive himself of the right to the custody of his children (*h*) or of his discretion as to their education. He "cannot bind himself conclusively by contract to exercise in all events in a particular way rights which the law gives him for the benefit of his children and not for his own." And an agreement to that effect—such as an agreement made before marriage between a husband and wife of different religions that boys shall be educated

M. & W. 675, 12 L. J. Ex. 444; *Plating Co. v. Farquharson* (1881) 17 Ch. Div. 49. Cp. 2 Ro. Ab. 115 G.

(*e*) *Hutley v. Hutley* (1873) L. R. 8 Q. B. 112, 42 L. J. Q. B. 52. But the interest of a bankrupt's creditors is more than "collateral": *Guy v. Churchill* (1888) 40 Ch. D.

481, 56 L. J. Ch. 670.

(*f*) *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 1, 52 L. J. Q. B. 454.

(*g*) *Hutley v. Hutley*, *supra*. See 2 Ro. Ab. 115, 116.

(*h*) *Re Andrews* (1873) L. R. 8 Q. B. 153, *sub nom. Re Edwards*, 42 L. J. Q. B. 99, and authorities there collected.

in the religion of the father, and girls in the religion of the mother—cannot be enforced as a contract (*i*).

After the father's death the Court has a certain discretion. The children are indeed to be brought up in his religion, unless it is distinctly shown by special circumstances that it would be contrary to the infant's benefit (*k*). When such circumstances are in question, however, the Court may inquire "whether the father has so acted that he ought to be held to have waived or abandoned his right to have his children educated in his own religion"; and in determining this the existence of such an agreement as above mentioned is material (*l*). The father's conduct in giving up the maintenance, control, or education of his children to others may not only leave the Court free to make after his death such provision as seems in itself best; it may preclude him even from asserting his rights in his lifetime (*m*).

Clauses in separation deeds or agreements for separation, purporting to bind the father to give up the general custody of his children or some of them, have for the like reasons been held void; and specific performance of an agreement to execute a separation deed containing such clauses has been refused (*n*). In one case, however, such a contract can be enforced; namely, where there has been such misconduct on the father's part that the Court would have interfered to take the custody of the children from him in the exercise of the appropriate jurisdiction and on grounds independent of contract. The general rule is only that the custody of children cannot be made a mere matter of bargain, not

In separation deeds.

(*i*) *Andrews v. Salt* (1873) L. R. 8 Ch. 622, 636.

(*k*) *Hawksworth v. Hawksworth* (1871) L. R. 6 Ch. 539, 40 L. J. Ch. 534.

(*l*) *Andrews v. Salt* (1873) L. R. 8 Ch. at p. 637.

(*m*) *Lyons v. Blenkin* (1820-1)

Jac. 245, 255, 263, 23 R. R. 38.

(*n*) *Vansittart v. Vansittart* (1858) 2 De G. & J. 249, 259, 27 L. J. Ch. 222. As to the validity of partial restrictions of the husband's right, *Hamilton v. Hector* (1871) L. R. 6 Ch. 701, L. R. 13 Eq. 511, 40 L. J. Ch. 692.

that the husband can in no circumstances bind himself not to set up his paternal rights (*o*).

36 & 37
Vict. c. 12,
s. 2.

The law on this point is now modified by the Act 36 & 37 Vict. c. 12, which enacts (s. 2) that

“No agreement contained in any separation deed between the father and mother of an infant or infants shall be held to be invalid by reason only of its providing that the father of such infant or infants shall give up the custody or control thereof to the mother: Provided always, that no Court shall enforce any such agreement if the Court shall be of opinion that it will not be for the benefit of the infant or infants to give effect thereto.”

This Act does not enable a father to delegate his general rights and powers as regards his infant children (*p*).

Mother of
illegiti-
mate
child.

The mother of an illegitimate child has parental duties and rights recognized by the law (*q*), and cannot deprive herself of them by contract (*r*).

On this
ground, in
part, the
doctrines
as to sepa-
ration
deeds in
general;

The objections formerly entertained (as we have seen) first against separation deeds in general, and afterwards down to quite recent times against giving full effect to them in courts of equity, were based in part upon the same sort of grounds: and so are the reasons for which agreements providing for a future separation have always been held invalid. For not the parties alone, but society at large is interested in the observance of the duties incident to the marriage contract, as a matter of public example and general welfare.

and as to
sale of
offices.

Considerations of the same kind enter into the policy of the law with respect to the sale of offices, also spoken of above. Such transactions clearly involve the abandonment or evasion of distinct legal duties.

Insurance
of sea-

On similar grounds, again, seamen's wages, or any

(*o*) *Swift v. Swift* (1865) 4 D. F. J. 710, 714, 34 L. J. Ch. 209, 394, and see the remarks in L. R. 6 Ch. 705, L. R. 13 Eq. 520.

(*p*) *Re Besant* (1879) 11 Ch. Div.

508, 518, 48 L. J. Ch. 497.

(*q*) *Barnardo v. McHugh* [1891] A. C. 388, 61 L. J. Q. B. 721.

(*r*) *Humphrys v. Polak* [1901] 2 K. B. 385, 70 L. J. K. B. 752, C. A.

remuneration in lieu of such wages, cannot be the subject of insurance at common law (s). The reason of this is said to be "that if the title to wages did not depend upon the earning of freight by the performance of the voyage, seamen would want one great stimulus to exertion in times of difficulty and danger" (t). This reason, however, is removed in England by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 157), which makes the right to wages independent of freight being earned. The question has not yet presented itself for decision whether the rule founded upon it is to be considered as removed also.

It has never been decided, but it seems highly probable, that agreements are void which directly tend to discourage the performance of social and moral duties. Such would be a covenant by a landowner to let all his cultivable land lie waste, or a clause in a charter-party prohibiting deviation even to save life (u).

(d) As to agreements unduly limiting the freedom of individual action.

There are certain points in which it is considered that the choice and free action of individuals should be as unfettered as possible. As a rule a man may bind himself to do or omit, or procure another to do or omit, anything which the law does not forbid to be done or left undone. The matters as to which this power is specially limited on grounds of general convenience are:—

- (α) Marriage.
- (β) Testamentary dispositions.
- (γ) Trade.

(α) Marriage is a thing in itself encouraged by the law; the marriage contract is moreover that which of all others

(s) *Webster v. De Tastet* (1797) 7 T. R. 157, 4 R. R. 402.

(t) *Kent, Comm.* 3. 269.

(u) *Per Cockburn C.J.* 5 C. P. D. at p. 305.

men's wages.
Agreements against social duty.

d. Public policy as to freedom of individual action.

(α) Marriage.

“Marriage
brokage”
agree-
ments
void.

should be the result of full and free consent. Certain agreements are therefore treated as against public policy either for tending to impede this freedom of consent and introduce unfit and extraneous motives into the contracting of particular marriages, or for tending to hinder marriage in general. The first class are the agreements to procure or negotiate marriages for reward, which are known as marriage brokage contracts. All such agreements are void (*x*), and services rendered without request in procuring or forwarding a marriage (at all events a clandestine or improper one) are not merely *no* consideration, but an *illegal* consideration, for a subsequent promise of reward, which promise, even if under seal, is therefore void (*y*). The law is said to be comparatively modern on this head: but it has already ceased to be of any practical importance (*z*).

Agree-
ment in
general
restraint
of mar-
riage void.

We pass on to the second class, agreements “in restraint of marriage” as they are called. An agreement by a bachelor or spinster not to marry at all is clearly void (*a*); so, it seems, would be a bare agreement not to marry within a particular time (*b*). In *Lowe v. Peers* (*c*) a covenant not to marry any person other than the covenantee was held void. A promise to marry nobody but A. B. cannot be construed as a promise to marry A. B. and is thus in mere restraint of marriage: and even if it could, it was thought doubtful whether an unilateral covenant to marry A. B. would be valid, A. B. not being bound by any reciprocal promise (*d*). Lord Mansfield threw out the

(*x*) *E.g. Cole v. Gibson* (1756) 1 Ves. Sr. 503. See Story, Eq. Jur. §§ 260 sqq.

(*y*) *Williamson v. Gihon* (1805) 2 Sch. & L. 357.

(*z*) In the Roman law these contracts were good apart from special legislation: they were limited as to amount (though with an expression of general disapproval) by a constitution preserved only in a Greek epitome: C. 5. 1. de sponsa-

libus, &c. 6. The Austrian Code agrees with our law (§ 879).

(*a*) *Lowe v. Peers* (1768) Wilmot, 371: where it is said that it is a contract to omit a moral duty, and “tends to depopulation, the greatest of all political sins.”

(*b*) *Hartley v. Rice* (1808) 10 East, 22, 10 R. R. 228 (a wager).

(*c*) (1768) 4 Burr. 2225, in Ex. Ch. Wilm. 364.

(*d*) But of this *qu.*: for a refusal

opinion (not without followers in our own time) (*e*), that even the ordinary contract by mutual promises of marriage is not free from mischievous consequences. The decision was affirmed in the Exchequer Chamber, where it was observed that:—

“Both ladies and gentlemen . . . frequently are induced to promise not to marry any other persons but the objects of their present passion; and if the law should not rescind such engagements they would become prisoners for life at the will of most inexorable jailors—disappointed lovers” (*f*).

A covenant not to revoke a will is not void as being a covenant not to marry, though the party's subsequent marriage would revoke the will by operation of law. As a covenant not to revoke the will in any other way it is good; but the party's marriage gives no ground of action as for a breach (*g*).

Covenant
not to re-
voke will.

In the absence of any known express decision, it may be gathered from the analogy of the cases on *conditions* in restraint of marriage (which hardly occur except in wills) that a contract not to marry some particular person, or any person of some particular class, would be good unless the real intention appeared to be to restrain marriage altogether; and that a contract by a widow or widower not to marry at all would probably be good (*h*).

As to *con-*
ditions in
restraint
of mar-
riage.

The rule against such conditions, at first adopted from the ecclesiastical courts on grounds of public policy, has been so modified in its application by courts of equity that it can now be treated only as an arbitrary rule of construction (*i*). By the law of France promises of marriage are

by A. B. to marry on request within a reasonable time would surely discharge the promisor on general principles. Cp. *Cock v. Richards* (1805) 10 Ves. 429, 8 R. R. 23.

(*e*) 4 Burr. 2230; per Martin B. *Hall v. Wright* (1858) E. B. & E. at p. 788, 29 L. J. Q. B. at p. 49.

(*f*) Wilm. 371.

(*g*) *Robinson v. Ommanney* (1883)

21 Ch. D. 780, 23 Ch. Div. 285, 52 L. J. Ch. 440.

(*h*) See *Scott v. Tyler* (1788) in 2 Wh. & T. L. C. and notes; and, as to a supposed difference between the rules applicable to real and personal estate, Mr. Cyprian Williams in L. Q. R. xii. 36.

(*i*) See per Jessel M. R. *Bellairs v. Bellairs* (1874) L. R. 18 Eq. 510,

invalid, "comme portant atteinte à la liberté illimitée qui doit exister dans les mariages": nevertheless if actual special damage (préjudice) can be shown to have resulted from non-fulfilment of the promise, the amount of it can be recovered, it would seem as due *ex delicto* rather than *ex contractu* (k).

(β) Agree-
ment to
influence
testator.

(β). An agreement to use influence with a testator in favour of a particular person or object is void (l). On the other hand, it is well established that a man may validly bind himself or his estate by contract to make any particular disposition (if in itself lawful) by his own will (m). Such contracts were not recognized by Roman law (n), and even a gift *inter vivos* of all the donor's after-acquired property would have been bad as an evasion of the rule: but in the modern law of Germany, as with us, a contract of this sort (Erbvertrag) is good (o).

(γ) Re-
straint of
trade.

General
principle:
Restrictive agree-
ments
allowed if
reason-
able in
interest of

(γ). Agreements in restraint of trade.

This class of cases presents a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the changed conditions of society and the requirements of modern commerce. The original principle is that a man ought not to be allowed to restrain himself by contract from exercising any lawful

516, 43 L. J. Ch. 669. The last case on the subject is *In re Nourse* [1899] 1 Ch. 63, 68 L. J. Ch. 15.

(k) See notes in Sirey and Gilbert on Code Civ. art. 1142, Nos. 11-19.

(l) *Debenham v. Ox* (1749) 1 Ves. Sr. 276.

(m) *De Beil v. Thomson* (1841) 3 Beav. 469, s. c. nom. *Hammersley v. Baron de Beil* (1845) 12 Cl. & F. 45; *Brookman's trusts* (1869) L. R. 5 Ch. 182, 39 L. J. Ch. 138. Whether a covenant to exercise a power of testamentary appointment in a particular way be valid, *quære*:

Thacker v. Key (1869) L. R. 8 Eq. 408; *Bulteel v. Plummer* (1870) 6 Ch. D. 160; per Brett L.J. *Palmer v. Locke* (1880) 15 Ch. Div. at p. 300.

(n) *Stipulatio hoc modo concepta: Si heredem me non feceris, tantum dare spondes? inutilis est, quia contra bonos mores est haec stipulatio.* D. 45. 1. de v. o. 61.

(o) Savigny, Syst. 4, 142-5; and now by German Civil Code, s. 2274 *sqq.*, subject to requirements of form.